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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
and
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals decision that the Federal Energy Regulatory Commission had authority under the Independent Offices Appropriations Act to impose on interstate natural gas pipeline companies the fees set forth in Commission Order Nos. 361, 361-A and 395 was in direct contravention of this Court's decisions in *FPC v. New England Power Co.*, 415 U.S. 345 (1974) and *National Cable Television Ass'n Inc. v. United States* 415 U.S. 336 (1974).

2. Whether the court of appeals erred in permitting the Federal Energy Regulatory Commission to impose, on a piecemeal basis, fees that in totality appear to be designed to recover the full cost of regulation of the natural gas industry in a manner similar to the annual fee outlawed in *FPC v. New England Power Co.*, 415 U.S. 345 (1974).

3. Whether the court of appeals erred in holding that the Federal Energy Regulatory Commission provided legally sufficient substantiation of the costs upon which it based its fees and in upholding a "direct billing" procedure that provides no objective and defined bases for determining when and how the procedure should be applied, or once applied, whether it has been correctly applied.

PARTIES BELOW

Petitioners in this case, both of whom participated in the proceedings below, are the Interstate Natural Gas Association of America ("INGAA") and Transcontinental Gas Pipe Line Corporation ("Transco").

INGAA is a non-profit trade association whose membership is composed of virtually all the major natural gas pipeline companies subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act, 15 U.S.C. § 717 ("NGA").*

* INGAA's member companies are: Alabama-Tennessee Natural Gas Company, Algonquin Gas Transmission Company, Arkla Energy Resources, Inc., The Coastal Corporation, The Columbia Gas System, Inc., Consolidated Natural Gas Company, El Paso Natural Gas Company, Enron Corporation, Granite State Gas Transmission, Inc., Great Lakes Gas Transmission Company, KN Energy, Inc., Kentucky West Virginia Gas Company, Locust Ridge Gas Company, Michigan Gas Storage Company, MidCon Corporation, Mountain Fuel Resources, Inc., Northwest Energy Company, Pacific Gas Transmission Company, Pacific Interstate Transmission Company, Panhandle Eastern Corporation, Ringwood Gathering Company, Southern Natural Gas Company, Tennessee Gas Transmission Company, Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Texas Oil & Gas Corporation, Transcontinental Gas Pipe Line Corporation, Valero Interstate Transmission Company, Valley Gas Transmission, Inc.

Transco is a member of INGAA and a natural gas company subject to the jurisdiction of the Commission under the NGA.**

The other parties to the proceeding below, besides the respondent Federal Energy Regulatory Commission, were petitioners Phillips Petroleum Company and Phillips Oil Company.

** In addition to the companies listed in Transco's Docketing Statement filed with the Tenth Circuit, the following companies are affiliated with Transco: Transco Offshore Gathering Company (successor to Exchange Oil & Gas Corporation), Trans-Virginia Public Service Corporation (successor to Transco Finance Corporation), Transco Canada Corporation (successor to Transco Finance Company), Transco Energy Ventures Company (successor to Transco Development Company and Transco Energy Company), Transco Energy Investment Company, Transco Energy Marketing Company, Transco Exploration Partners, Ltd., Transco Gas Services Company, Inc., Transco Resources, Inc., Transeastern Gas Pipeline Company, Inc., Transmat Corporation, Transylvania Gas Pipeline Company, Inc., Petro Source Corporation, EAC, Inc., Elleron Chemicals Corporation, Petro Source Company, Petro Source Products Company, Petro Source Refining Corporation, Texon Corporation, Petrosource Transportation, Petro Source Resources, Petro Source Hydrocarbon Services, Petro Source Energy, Petro Source Oil Company, Northwest Pipeline Corp., Petro Source, Inc., Petro Source (The Partnership), Border Gas, Inc., Bell County Coal Corporation, Blue Crystal Coal Sales Co., Typo Mining, Inc., Valley View Coal, Inc., McCoy Elkhorn Coal Corporation, Beech Grove Processing Company, Inland Ports, Inc., Aceco, Inc., Aminex Coal Corporation, Aminex Coal Development Corporation, Bituminous-Laurel Mining, Inc., Johns Creek Elkhorn Coal Corporation, Transco Coal Services Company, Alpine Coal, Inc., Cross Mtn. Coal, Inc., Farmer Coal Company, Inc., Highland Coal, Inc., Interstate Coal Company, Inc., Kem Coal Company, Ken-Coal, Inc., Leeco, Inc., Mountain Clay, Inc., Randall Fuel Company, Inc., Stansbury & Company, Inc., New Brush Creek Mining, Inc., Polls Creek Coal Co., Inc., Pro-Land, Inc., The Twenty Two Sixty Five Corporation, Wildcat Coal Sales, Inc., Oswayo Mining, Inc., Sizemore Trucking, Inc., River Coal Company, Indian Head Mining Company, Morgan Coal Company, Alpha Coal Company, Inc. and Voyager Energy Company.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Interstate Natural Gas Association of America ("INGAA") and Transcontinental Gas Pipe Line Corporation ("Transco") hereby petition the Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on March 10, 1986 affirming Federal Energy Regulatory Commission ("Commission") Order No. 361, Fees Applicable to Natural Gas Pipeline Rate Matters (issued February 6, 1984), Order No. 361-A denying rehearing of Order No. 361 (issued April 20, 1984) and Order No. 395, General Activities Fee Rule (issued August 31, 1984), rehearing denied, October 31, 1984.[1] The Commission orders require natural gas pipeline companies subject to

[1] Petitioners challenge Order No. 395 only to the extent that it contains the same "direct billing" procedures as Order Nos. 361 and 361-A. Consequently, it is not, hereafter, separately referenced in this Petition.

the Commission's jurisdiction to pay for the various Commission activities specified in Order Nos. 361 and 361-A. Because of the nature of the charges sought to be imposed, this proceeding will decide the broad question of whether and to what extent regulated companies should be required to bear the financial burden of regulation undertaken in the public interest.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in *Phillips Petroleum Co., et al. v. FERC,* 786 F.2d 370 (10th Cir. 1986); a copy of that decision is contained in the Appendix at Section A. The Commission's Order No. 361 is reported at FERC Statutes & Regulations (CCH) ¶ 30,542 (1984) and Order No. 361-A denying rehearing of Order No. 361 at 27 FERC ¶ 61,113; Order No. 395 is reported at FERC Statutes & Regulations (CCH) ¶ 30,592 (1984), rehearing denied, *id.*, ¶ 30,609 (1984). These orders are contained in the Appendix at Sections B, C and D respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1986 and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute upon which the court of appeals decision is based is the Independent Offices Appropriation Act, 31 U.S.C. § 483a (1970), *recodified* at 31 U.S.C. § 9701 (1982) ("IOAA"), the relevant portions of which are contained in the Appendix at Section E.

STATEMENT OF THE CASE

This case involves the authority of the Federal Energy Regulatory Commission under Title V of the IOAA to levy charges for performing regulatory duties under the Natural Gas Act, which duties Congress expressly imposed on the Commission to protect the public interest in having access to natural gas at just and reasonable rates.

Background

On March 10, 1986, in *Phillips Petroleum Co., et al. v. FERC,* 786 F.2d 370 (10th Cir.) (*"Phillips Petroleum"*), the court below upheld Commission Order Nos. 361 and 361-A against challenge by INGAA and Transco. These Orders had their genesis in a Notice of Proposed Rulemaking ("NOPR") issued on December 15, 1982 (Docket No. RM83-2-000). In the NOPR, the Commission presented a portion of what it claimed would be a comprehensive proposal to establish fees designed to reimburse the Commission for essentially all of the costs incurred in performing its regulatory responsibilities pursuant to the statutes and regulations governing its activities.[2] In particular, the NOPR contained a proposal to establish fees to reimburse the Commission for the costs—both direct and indirect—incurred in carrying out its rate regulation responsibilities under the NGA. Citing Title V of the IOAA and Bureau of the Budget Circular A-25, issued September 23, 1959, as authority for its proposed charges, the Commission made the following as its only explanation for the proposed charges:

> *With respect to each of the above services,* [associated with the processing of pipeline rate filings], *the Commission believes that each identifiable applicant for these kinds of Commission services derives more*

[2] In addition to establishing fees applicable to natural gas pipeline rate filings in Order Nos. 361 and 361-A, the Commission established fees applicable to producer matters under the NGA in Order Nos. 360 and 360-A. Phillips Petroleum Company and Phillips Oil Company, the other parties to the proceeding below, petitioned the court of appeals for review of Order Nos. 360 and 360-A (Case No. 84-1840) and the petition brought by Transco and INGAA was consolidated in the Phillips proceeding.

> *substantial benefits than those benefits accruing to the general public.* They are, therefore, the recipients of special benefits from the Commission. The Commission proposes to assess against any individual or entity seeking these services, a fee designed to recover the costs associated with providing that service.

47 Fed. Reg. 57943, 57945 (1982). (emphasis supplied.)

Following the submission of written comments by joint petitioners individually and by other interested members of the natural gas industry, the Commission issued Order No. 361. By its Order, the Commission established fees and billing procedures for filings involving, among other things, general changes in rates and cost adjustments. In addition, the Commission reserved the "option" of ordering "direct billing" to recover its claimed costs of processing any tariff filing which the Commission might deem to be "an extraordinary filing." Under this procedure, the Commission has discretion not to apply the established set charge but to periodically bill the entity that submitted the filing for all costs incurred in processing the filing.

On March 7, 1984, INGAA and Transco individually petitioned the Commission for rehearing of Order No. 361 claiming that the Commission lacked the authority to impose charges designed to reimburse it for its cost in regulating natural gas pipeline rates. INGAA and Transco do not and did not challenge the Commission's authority to establish *any* fee; they challenged primarily the Commission's authority to establish fees rendered for services performed pursuant to the Commission's authority under Section 4 of the NGA to regulate prices charged by the pipelines. Section 4 of the NGA requires that rates charged by pipelines should be just and reasonable. Pipelines desirous of changing their rates to pass-through increased costs may do so only with the Commission's approval.

In their petition for rehearing before the Commission, INGAA and Transco contended that no "special benefit" (a benefit accruing to the pipelines above and beyond the benefit bestowed on the public), which is required to justify the

imposition of a fee, was conferred on natural gas pipelines as a result of Commission rate regulation. Both of the joint petitioners further urged that the Commission's reservation of an "optional" direct billing procedure was vague, subjective and open-ended and, therefore, inconsistent with the IOAA and established precedent for the imposition of a valid fee structure. Finally, Petitioners showed that the Commission failed to provide data to support the costs claimed as the basis for the pipeline tariff filing fees.

On April 20, 1984, the Commission issued Order No. 361-A denying rehearing. The Commission dismissed the argument that the Commission's regulation of pipelines' rates was undertaken primarily for the benefit of the general public and conferred no "special benefit" on natural gas pipelines. Instead, the Commission stood by its conclusory statement in Order No. 361, wherein it merely asserted that its rate review functions were undertaken for the benefit of the pipelines. Likewise, the Commission rejected the Petitioners' arguments that the "optional" direct billing procedure was unlawful. According to the Commission, the procedure was not impermissibly vague because direct billing would be used "infrequently" in the pipeline rate area and, therefore, it was unnecessary to devise a generic formula for apportioning direct billing costs among parties to a rate proceeding. Finally, the Commission then concluded that its explanation in Order No. 361 of the cost basis of the fees prescribed therein was sufficiently detailed.

After timely petitions for review by INGAA and Transco in the United States Courts of Appeals for the District of Columbia Circuit and the Fifth Circuit respectively, the appeals were consolidated in the Tenth Circuit with the Phillips Petroleum Company and Phillips Oil Company appeal of fee orders relating to natural gas producers.

The court of appeals rejected Petitioners' contentions that the IOAA and the decisions of this court in *FPC v. New England Power Co.*, 415 U.S. 345 (1974) and *National Cable Television Ass'n Inc. v. United States* 415 U.S. 336 (1974) required that the Orders Nos. 361 and 361-A be vacated as beyond the statutory authority conferred on the Commission by IOAA.

The court determined that later court of appeals decisions in *National Cable Television Ass'n v. FCC,* 554 F.2d 1094 (D.C. Cir. 1976), *Electronic Industries Ass'n v. FCC,* 554 F.2d 1109 (D.C. Cir. 1976), *Mississippi Power & Light Co. v. NRC,* 601 F.2d 223 (5th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980) and *Nevada Power Co. v. Watt,* 711 F.2d 913 (10th Cir. 1983), disposed of the question of whether FERC was bestowing a "special benefit" on the Petitioners in the circumstances presented by Commission Order Nos. 361 and 361-A. The court rejected Petitioners' contention that they received no special benefit, stating simply that the NGA under which they are regulated was passed specifically to constrict pipeline earnings and prevent pipelines from using their monopoly position. The court opined that the fees imposed were for services that permitted the regulated companies to engage in their respective activities or to comply with the NGA and that they were, therefore, permissible. *Phillips Petroleum,* Appendix, Section A at 13a. The court similarly rejected Petitioners' contention that the Commission had failed to substantiate the cost basis underlying its fees and that direct billing constituted an uncontrolled and standardless reach by the agency into the corporate treasury.

REASONS FOR GRANTING WRIT

I

THE DECISION OF THE COURT BELOW FLOUTS THE INTENT OF CONGRESS IN PASSING THE INDEPENDENT OFFICES APPROPRIATIONS ACT AS INTERPRETED BY THS COURT IN *NEW ENGLAND POWER* AND *NATIONAL CABLE*

This Court's decisions in *FPC v. New England Power Co.,* 415 U.S. 345 (1974) ("New England Power") and *National Cable Television Ass'n Inc. v. United States* 415 U.S. 336 (1974) ("National Cable") define the characteristics of a fee authorized by the IOAA. *New England Power* affirmed the judgment of the Court of Appeals for the District of Columbia Circuit which set aside Commission Order No. 427 of the Federal Power Commission, the predecessor of the respondent

Commission, 45 F.P.C. 440 (1971). The vacated Commission order sought to establish annual fees, levied on all regulated companies, to reimburse the Commission for those costs of regulating the natural gas pipeline industry not met by licensing fees. The court of appeals found that the Commission's regulation of the natural gas industry, in particular its rate regulation functions, did not confer a "special benefit" upon an identifiable recipient and that the annual fee was therefore unlawful. *New England Power Co. v. FPC*, 467 F.2d 425, 429 (D.C. Cir. 1972).

In affirming the court of appeal's decision in *New England Power Co., supra,* this Court held that the IOAA authorizes the imposition of a fee, not a revenue raising tax. It endorsed Budget Circular No. A-25 (Appendix, Section F) issued by the then Bureau of the Budget as the "proper construction of the Act" (*New England Power,* 415 U.S. at 352), and held that an impost is a fee only if there is an identifiable special service rendered and a recipient fee payor that receives a special benefit. The contemporaneous *National Cable* decision further defined a fee as:

> incident to a voluntary act, *e.g.,* a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.

National Cable, 415 U.S. at 340-41.

In *National Cable,* the Court was again concerned that the agency, in that instance the Federal Communications Commission ("FCC"), had imposed a fee that was aimed at raising revenue rather than providing a special benefit. The FCC calculated its fee to recoup all its regulatory costs.[3] *Id.* at 341.

[3] It took the total cost of operating the pertinent agency divisions, subtracted out other fees paid and prorated the remainder over the number of subscribers serviced by the regulated entity. The FCC determined that the prorated amount approximated the value to the recipient of the FCC's oversight activities.

The Court analyzed how the IOAA requirement that public policy be taken into consideration could be used to impose higher fees. To guard against this, it determined that fees could not exceed the value of the service to the recipient. The Court thus determined the measure of the maximum fee that can be imposed to assure against unlawful agency revenue raising. In this context, however, the Court noted:

> If assessments are made .... which are sufficient to recoup costs to the Commission, [the regulated entities] ... would be paying not only for the benefits they received but for the protective services rendered the public by the Commission.

The Court did not say that public benefit considerations could be read out of the Act. To the contrary, it was concerned that a proper balance should be struck, and that the agency remove from its fees costs attributable to servicing the public interest.

> It is not enough to figure the total cost ... for operating a unit of supervision and then to contrive a formula that reimburses the Commission for that amount. Certainly, some of the costs inured to the benefit of the public, unless the entire regulatory scheme is a failure, which we refuse to assume.

Id. at 343.

The fees established by the Commission's Order Nos. 361 and 361-A are claimed by the Commission to be designed to reimburse it for costs associated with its responsibilities to regulate the rates of pipelines under the NGA. Therefore, under the standards of the IOAA as interpreted by Budget Circular No. 25-A and interpreted by this Court in *New England Power* and *National Cable,* the Commission must establish that these rate regulation responsibilities confer "specific benefits" upon the regulated companies and are not primarily designed to benefit the public.

The fee scheme installed by Order Nos. 361 and 361-A and endorsed by the court below, far from meeting these requirements, turns *New England Power* and *National Cable*

upside down and obliterates this Court's carefully drawn distinction between public and private benefits. In a thinly veiled effort to comply with *New England Power,* the orders merely assert that there are individual benefits to individual participants in the regulatory scheme. These benefits are neither specified nor quantified. Instead, the Commission simply imposed its full cost of regulation on the regulated entities by the simple expedient of manipulating the "benefit" requirement.

The Commission's fee schedule rests on the claim that *all* the Commission's regulatory activities are of "special benefit" to the regulated because the Commission is assisting regulated companies to comply with the law. The Commission, in essence, is insisting that its statutory functions have a value independent of the type of regulatory activity undertaken—that controlling a pipeline's revenues and earnings is in the same class as granting a permit to build a pipeline or a house, or to practice medicine. The assertion rests on a subjective, standardless and shifting assessment of benefit that makes a mockery of the strict limits of the IOAA and this Court's decisions. It also ignores the public interest factor analyzed in *National Cable* and has all the characteristics of revenue raising that this Court sought to guard against in *National Cable.* If all regulatory activities bestow special benefits because of the fact of regulation, there is no practical limit to the fees that can be imposed; the agency may expand its activities and staff without regard to necessity or expense, provided only that its 'fee' income matches expenses.

The most obvious flaw in the decision of the court below is that the IOAA was not intended as an infinitely elastic answer to changing regulatory fashions. On its face and by intent the Act does not countenance the charges at issue in Order Nos. 361 and 361-A. The IOAA enumerates the specific and discrete types of service for which fees could be charged because, as the legislative history of the IOAA makes clear, Congress recognized the complexities of framing one statute universally applicable to the diverse activities of all federal agencies. The list represented the activities common to all agencies for which it was agreed there should be charges pending passage of individual acts addressing the unique regulatory circumstances of each

agency. It was not intended to be all encompassing and, as the list makes clear, was intended to cover only traditionally defined benefits and privileges. That the IOAA remains over 30 years after its passage the sole source of authority for the imposition of fees on the Commission's regulatory activities under the NGA, does not confer on the Commission the right to expand the Act's scope. That is clearly a legislative function. The Commission cannot by fiat change the original intent of the IOAA to conform to a recently conceived notion of what expenses it believes should be borne by regulated companies. The fees imposed by Order Nos. 361 and 361-A are not of the character prescribed by the clear statutory language. They require regulated companies to pay the Commission for reducing their rates, revenues and earnings, a function which bears no resemblance to the license, permit, privilege or other similar thing specified in the IOAA. The contested orders, thus, represent nothing less than an attempt by the Commission to shift onto regulated companies the cost of performing basic and inherently public benefit functions not covered by the IOAA.

That the IOAA was not intended to cover the consumer protection function perfomed by the Commission in determining that pipeline rates are just and reasonable is borne out by the legislative history of the IOAA. The legislative history of the Act is not extensive. It is fully discussed in the concurring opinion of Justices Marshall and Brennan in *New England Power* and will not be repeated here. *See New England Power,* 415 U.S. at 1157-58. The concurring opinion concluded that the legislative history is sufficient to make clear that fees may be charged only to special beneficiaries and not to recoup the agency's regulatory costs generally. Specifically, it concluded that:

> [I]t [the IOAA] contemplated imposition of application fees, registration fees, fees for grants of licenses, permits or other similar authorizations. This interpretation is consistent with the statutory language with its long enumeration of specific, readily identifiable, and discrete Commission actions for which fees can be charged.
>
> * * *

> [N]othing in the legislative history suggests a broader definition of benefit under the Act. On the contrary, since the broader view that the full cost of regulation should be assessed those subject to the agency's jurisdiction in the absence of a 'special benefit' would have represented a controversial policy choice, . . . the very lack of debate . . . and the ease with which it passed compel the more limited interpretation.

New England Power, 415 U.S at 356-57 (concurring opinion of Marshall J. and Brennan J.)

The IOAA authorizes the assessment of fees only in connection with services rendered by the government above and beyond the service or benefit regularly received by the public at large. The power thus vested in the Commission by Title V of the IOAA is clearly limited and did not include authority to impose fees for the performance of regulatory functions of a nonlicensing character.

The administrative interpretation of the Act, set forth in Budget Circular No. A-25, (Appendix, Section F), and endorsed by this Court in *New England Power,* similarly construes the powers granted by the IOAA as limited. The circular tracks the statutory language and follows the legislative history in focussing on activities of a traditional licensing character. Significantly, the circular is silent on rate regulation.

Moreover, the Commission has previously acknowledged its lack of authority to assess the type of fees or charges at issue here. It recognized that the provision of services to assist regulated companies to comply with the law did not afford an independent basis on which to levy fees and that it could not be bootstrapped into an authority to levy fees not specified in the IOAA. In its notice of rulemaking which culminated in the promulgation of Order No. 317, 35 FPC 30 (1966), which established fees primarily in connection with the filing of pipeline certificate applications, the Commisssion stated:

> The assessment of user charges or other fees with respect to the exercise of *our regulatory activities under . . . the general rate and accounting provisions*

> *of the Natural Gas Act* would not be appropriate since these activities *are primarily for the benefit of the general public rather than the regulated companies.*

30 Fed. Reg. 12077 (1965) (emphasis supplied).

The language of the statute, its legislative and administrative history and interpretation, and previous judgments by the Commission about the illegality of imposing the fees at issue here demonstrate that the court below erred in failing to vacate the fees as requested by Petitioners herein and in doing so violated the IOAA.

National Cable points up another significant defect in the lower court's analysis—the failure to give proper weight to the public interest. The Commission declared, and the court below affirmed, that the public interest in the NGA is merely incidental to the regulatory benefits. Designating that interest as incidental was a prelude to ignoring it. The significance of that public interest, however, is enshrined in the statute itself and is acknowledged in *National Cable* and must be accommodated as intended by the IOAA. As Budget Circular No. A-25 makes clear, where the public interest is predominant, a fee may not be charged.

When Congress enacted the NGA, it declared the business of transportation and sale of natural gas in interstate commerce to be "affected with a public interest" which required regulation to protect that interest. 15 U.S.C. 717(c). This Court endorsed that concept in *FPC v. Hope Natural Gas,* 320 U.S. 591, 610 (1944), namely that the NGA was enacted to address the "specific evils" uncovered by the Federal Trade Commission and the provisions authorizing the Commission to fix "just and reasonable rates" were designed clearly "to protect the consumer interests against exploitation at the hands of natural gas companies." 320 U.S. at 610. *See also Atlantic Refining Co. v. Public Service Commission,* 360 U.S. 378 (1959).

Pertinent to the precise circumstances at issue here, the Court of Appeals for the District of Columbia Circuit, in striking down the Federal Power Commission's annual fees in

its Order No. 427, in *New England Power Co. v. FPC*, 467 F.2d 425 (D.C. Cir. 1972), *aff'd, New England Power*, 415 U.S. 345 (1974), found the primary purpose of the Commission's responsibilities under the NGA is to protect the general public. In fact, the court of appeals specifically dismissed Commission arguments that it would lawfully recover its costs associated with its NGA regulatory responsibilities based on its finding that:

> [T]he regulation of these industries is primarily for the benefit of the public. Their charter statutes require them to so act. The courts have so held. There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public. In the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury. We are well aware of the burgeoning administrative expense of operating the Government, however, only Congress can give authority to levy these fees. It has not done so here.

467 F.2d at 429 (footnote omitted).

Because the Commission's rate regulatory functions are undertaken for the purposes specified in the NGA, the ultimate beneficiary of the Commission's regulatory activities under Section 4 of the NGA is the general public and not the natural gas pipelines that make rate filings. The imposition of fees is, therefore, unlawful.

II

THE COURT BELOW ERRED IN UPHOLDING FEE SCHEDULES THAT ARBITRARILY AND CAPRICIOUSLY FAIL TO IDENTIFY THE CRITERIA ON WHICH FEE CALCULATIONS ARE BASED

The court below erred in giving unquestioning deference to an arbitrary and capricious Commission explanation of the

basis on which it calculated its fees. The court accepted without inquiry an "explanation" of the fees and the calculations underlying them that fails absolutely to provide the regulated companies with any means of evaluating the Commission's conclusions and methodology. Consequently, regulated companies are left to assume that the agency has acted properly. The law prohibits the Commission from leaving regulated entities to such thin protection against abuse.

With respect to the direct billing procedure initiated by Order Nos. 361 and 361-A, the Commission has failed to specify the standards for determining when a rate filing is "extraordinary" or "not average." Similarly, the Commission has failed to state the standard or cost basis on which such a fee would be calculated. In essence, the Commission has reserved to itself the right to require regulated companies to deliver themselves into the Commission's hands on the basis of blind faith. The companies, therefore, are vulnerable to agency notions of complexity which are not predictable or comprehensible by any objective standard. The pervasive vagueness surrounding the purpose and application of this procedure renders it unlawfully arbitrary and capricious.

CONCLUSION

The court below has succeeded in rendering meaningless this Court's careful delineation of special and public benefits under the IOAA. It has bestowed upon the Commission a financial independence in which the only practical control over the agency's collection of revenue is the size of the agency's operation—which in itself, absent the restraint imposed by the usual Congressional budgetary controls, may prove to be highly expansionary. The IOAA was not intended as a vehicle by which Congress would abdicate responsibility for controlling the basic costs of funding governmental operations, or as a vehicle to finance all government operations—under the impact of the decision at issue here, that outcome is now sanctioned.

FOR THE FOREGOING REASONS, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
and
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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SECTION A

United States Court of Appeals

FOR THE TENTH CIRCUIT

**Nos. 84-1846, 84-2267, 84-2270,
84-2786, 84-2787, 85-1396,
85-1397, 85-1398, and 85-1399**

PHILLIPS PETROLEUM COMPANY,
PHILLIPS OIL COMPANY,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

CONOCO, INC.,
Intervenor.

PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

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Before **BARRETT** and **MOORE**, Circuit Judges, and **THEIS**,* District Judge.

BARRETT, Circuit Judge.

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* The Honorable Frank G. Theis, United States District Judge for the District of Kansas, sitting by designation.

This case involves consolidated petitions to review four rules promulgated by the Federal Energy Regulatory Commission (FERC or Commission). The rules establish fees pursuant to the Independent Offices Appropriations Act (IOAA), 31 U.S.C. § 4830, *recodified,* 31 U.S.C. § 9701, which authorizes agencies to collect fees for services provided to identifiable beneficiaries and thereby make agencies "self-sustaining to the extent possible." These rules are FERC orders 360, 361, 394, and 395.

FERC Order 360

First, we are asked to review FERC order 360, "Fees Applicable to Producer Matters Under the Natural Gas Act," accompanied by order 360-A, "Order Denying Rehearing and Clarifying the Final Rule," issued February 6, 1984, and April 20, 1984, respectively. A petition to review was filed in this court by Phillips Petroleum Company and Phillips Oil Company (Phillips) on June 18, 1984.

FERC order 360 establishes fees for the services and benefits the Commission provides to producers under the Natural Gas Act (NGA), 15 U.S.C. §§ 717-717w. According

to the Commission, the rule is authorized by the IOAA. Specifically, under order 360 the Commission established the following fee schedule for services and benefits provided to producers under the NGA:

> (1) $800 for Commission review of applications for blanket certificates for small producers under section 7(c) of the NGA, filed in accordance with 18 C.F.R. § 157.40(b);
>
> (2) $1600 for Commission review of applications by producers for certificates of public convenience or necessity under § 7(c) of the NGA filed in accordance with 18 C.F.R. part 157;
>
> (3) $300 for a Commission review of changes in producer rates schedules under section 4 of the NGA, filed in accordance with 18 C.F.R. § 154.94.

FERC Order 361

Second, we are asked to review FERC order 361, "Fees Applicable to Natural Gas Pipeline Rate Matters," accompanied by order 361-A, "Order Denying Rehearing," issued February 6, 1984, and April 20, 1984, respectively. Transcontinental Gas Pipeline Corporation (Transco) filed its petition to review on June 19, 1984, in the United States Court of Appeals for the Fifth Circuit. Interstate Natural Gas Association of America (INGAA) filed its petition to review these orders in the United States Court of Appeals for the District of Columbia Circuit on June 19, 1984. The Transco and INGAA appeals were transferred to this court pursuant to 28 U.S.C. § 2112(a) and consolidated with the petition to review FERC orders 360 and 360-A filed by Phillips on June 18, 1984.

FERC order 361 establishes fees for services and benefits provided to natural gas pipeline owners under the NGA and related authorities. The Cmmission also maintains this rule is authorized under the IOAA and established the following fees for pipeline rate matters:

(1) $2000 for Commission review of pipeline tariff filings for general changes in rates and for changes other than rates under section 4 or section 5 of the NGA, filed in accordance with 18 C.F.R. § 154.63;

(2) $2300 for Commission review of pipeline tariff filings that tract certain changes and costs under section 4 and section 5 of the NGA, filed in accordance with the 18 C.F.R. § 154.38 or pursuant to approved tariff provisions, orders of the Commission or settlement agreements with the Commission;

(3) direct billings for Commission review of petitions seeking advance Commission approval of rate treatment of research, development, and demonstration of expenditures filed in accordance with 18 C.F.R. § 154.38(d)(5).

FERC Order 394

Third, we are asked to review FERC order 394, "Fees Applicable to the Natural Gas Policy Act," accompanied by "Order Denying Rehearing," issued August 31, 1984, and October 31, 1984, respectively. The Phillips petition to review order 394 was filed in this court on December 27, 1984. INGAA's and Transco's petitions were filed in the United States Court of Appeals for the District of Columbia Circuit on December 28, 1984 and were transferred to this court pursuant to 28 U.S.C. § 2112(a).

FERC order 394 establishes fees for services and benefits provided under the Natural Gas Policy Act (NGPA), 15 U.S.C. §§ 3301-3432. Using the basic methodology for establishing fees with respect to services and benefits under orders 360 and 361, the Commission established the following fees under the IOAA:

(1) $6000 to apply for adjustments under section 502(c) of the NGPA, including exemptions from incremental pricing under section 206(d);

(2) $25 for Commission review of a jurisdictional agency determination;

(3) $2000 to petition for approval for rates and charges for transportation of natural gas under 18 C.F.R. § 284.123(b(2);

(4) $800 for initial or extension reports filed in accordance with 18 C.F.R. §§ 284.106, 284.126, 284.148, and 284.163 for transactions authorized under Title 3 of the NGPA;

(5) $1200 for requests for interpretation of the NGPA by the office of the General Counsel.

FERC Order 395

Fourth, we are asked to review FERC order 395, "General Activities Fees Rule," accompanied by "Order Denying Rehearing and Making Technical Corrections," issued on December 15, 1982, and October 31, 1984, respectively. On December 27, 1984, Phillips petitioned this court to review those orders and on December 28, 1984, INGGA and Transco individually petitioned the United States Court of Appeals for the District of Columbia Circuit to review the same orders. The petitions for review filed by INGAA and Transco were transferred to this court and consolidated with the Phillips appeal pursuant to 28 U.S.C. § 2112(a).

FERC order 395 establishes fees pursuant to the IOAA applicable to "general activities" of the Commission. The methodology followed in promulgating this rule was the same as in orders 360, 361, and 394. The initial fees, subject to subsequent annual adjustments, are as follows:

(1) $4900 for a petition for issuance of a declaratory order other that one solely concerned with matters arising under Part I of the Federal Power Act;

(2) $100 for requests for interpretation from the Office of Chief Accountants;

(3) $3700 for a petition for review of a Department of Energy (DOE) denial of adjustment if the amount in controversy exceeds $30,000; $60 of the amount in controversy is $10,000 up to and including $29,999; and $100 if the amount in controversy is $0 up to and including $9,999;

(4) $2900 for review of DOE remedial order if the amount in controversy exceeds $30,000; $600 if the amount in controversy is $10,000, up to and including $20,999; and $100 if the amount in controversy is $0 up to and including $9,999; and

(5) $5.60 per quarter hour for professional employees, and $2.40 per quarter hour for clerical employees for search time performed while responding to Freedom of Information Act requests.

This court's jurisdiction to consider these petitions for review arises under section § 717r(b) of the NGA, section 3416 of the NGPA, Rule 15 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2112.

The issues raised in the petitions for review can be summarized as follows: (1) whether FERC correctly held that it had the legal authority under the IOAA to establish fees for various services it performs under the NGA and the NGPA; and (2) whether the Commission's procedures in establishing the fees constitute a lawful exercise of the Commission's authority.

I. SCOPE OF REVIEW

The scope of our review of agency actions is generally defined by section 706 of the Administrative Procedure Act (APA). 5 U.S.C. § 706. The scope of review under section 706 depends upon (1) whether the agency action is an adjudication or a formal rulemaking, in which case the standard of review is the substantial evidence standard, or (2) whether the agency action is an informal rulemaking, in which case the standard to be applied is the arbitrary and capricious standard. *Compare* 5 U.S.C. § 706(2(A) and (E).

The Supreme Court has held that the APA establishes the maximum procedural requirements which the courts may impose on agencies. While additional procedural requirements may be imposed by Congress or an agency, reviewing courts are generally not free to impose them. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978). Thus, the scope of our review is governed by the APA's standards unless we find supplementary authority to the contrary.

There is nothing in the NGA, the NGPA, or the IOAA to lead us to conclude that in promulgating these rules the Commission engaged in anything other than an informal rulemaking procedure. An "informal rule" is one promulgated pursuant to section 553 of the APA. *Motor Vehicle Manufacturers Ass'n v. State Farm*, 463 U.S. 29, 41 (1983). Whereas none of these Acts define the scope of our review, "The Agency's action in promulgating such [rules] therefore may be set aside if found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A)." *Id.* Contrary to the position advanced by some of the petitioners, the "substantial evidence" standard is not appropriate in reviewing informal rulemaking proceedings under the APA. *Western Union Telegraph Co. v. FCC*, 665 F.2d 1112, 1148 (D.C. Cir. 1981).

We should also note that our review of these FERC orders involves at least one question of law: the Commission's legal authority to promulgate these rules. Section 706 of the APA requires that, "[t]o the extent necessary for decision and when presented, the reviewing court shall decide all relevant questions of law." 5 U.S.C. § 706. While most courts accord some deference to an agency's determination of legal questions, the APA appears to require a *de novo* review of questions of law. *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

II. STATUTORY AUTHORITY

In orders 360, 361, 394, and 395, the Commission relies upon the IOAA to establish fees for services and benefits it provides under the NGA or the NGPA. (R., Vol. I, p. 2; R., Vol. II, p.1; R., Vol. III, p. 1; R., Vol. IV, p. 2.) The IOAA provides in part:

> [A]ny work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation . . . to prescribe therefor such fee, charge, or price, if any, as he shall determine, in the case none exists, or redetermine, in case of any existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts . . . .

31 U.S.C. § 483a, *recodified without substantive change,* 31 U.S.C. § 9701.

The principal interpretation of the IOAA is Bureau of the Budget Circular A-25 which states that a fee should be assessed against each identifiable recipient of a measurable unit or amount of Government service or property from which such recipient receives a special benefit. Specifically, Circular No. A-25 provides:

> 3. *General Policy.* A reasonable charge . . . should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit.

a. *Special services.*

(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insurance, or *license to carry on a specific business*); or

(b) Provides business stability or *assures public confidence* in the business activity of the beneficiary (e.g., *certificates of necessity and convenience* for airline routes, or safety inspection of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by the same industry or group or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

Bureau of the Budget Circular No. A-25 (September 23, 1959) (emphasis added).

In *National Cable Television Ass'n v. FCC*, 415 U.S. 336, 342 (1974), the Supreme Court reviewed the IOAA and determined that agencies had authority to charge fees to recipients of "special benefits," but that agencies could not tax such recipients. In a companion case, the Court adopted as

"the proper construction of the Act" Budget Circular No. A-25. *Federal Power Commission v. New England Power Co.*, 415 U.S. 345, 351 (1974).

The parties agree that the IOAA and Circular A-25 set forth the relevant authority of the Commission to promulgate these rules. In addition, the parties agree that under the established precedent which construes the IOAA and Circular A-25, the transfer of a "special benefit" to an identifiable recipient is a prerequisite for establishing a lawful fee by an agency. While they rely on identical authority, the parties differ regarding on the meaning of the term "special benefits." In addition, they disagree on the effect that public versus private "benefits" have on an agency's authority to assess fees.

Petitioners argue that the NGA and the NGPA were enacted with the primary purpose of benefiting the public. They argue that the principal purpose of the NGA and the NGPA is to control the profits of enterprises that are perceived to have monopoly control over certain natural resources. The focus of the Acts is upon reducing rates, a function benefiting the public, not the regulated entity. Any "special benefits" conferred by the FERC under the NGA or the NGPA accrue to the general public not to the regulated industries. Therefore under the IOAA the cost of providing "special benefits" to the public cannot be assessed against and borne by petitioners. The Commission's response to this argument is that as long as a "special benefit" runs to the regulated entity, an agency may assess a fee, even if the public also benefits from the regulation.

Both the Commission and petitioners rely on *National Cable Television Ass'n v. FCC*, 554 F.2d 1094 (D.C. Cir. 1976) (*National Cable II*), *Electronic Industries Ass'n v. FCC*, 554 F.2d 1109 (D.C. Cir. 1976), *Mississippi Power & Light Co. v. NRC*, 601 F.2d 223 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980), and our decision in *Nevada Power Co. v. Watt*, 711 F.2d 913 (10th Cir. 1983) to support their positions. We believe these cases which interpret and apply the IOAA are dispositive.

In *National Cable II,* petitioners there challenged the Federal Communication Commission's (FCC) assessment of an annual authorization fee to recover the costs associated with the processing of applications and tariff filings. After noting that under the rules of the FCC "[n]o cable television system shall commence operations or add . . . to existing operations *unless it receives a certificate of compliance from the Commission,*" 554 F.2d at 1101 (quoting 47 C.F.R. § 76.11(a)(1975)) (emphasis in original), the court held: "The issuance of a certificate of compliance under 47 C.F.R. § 76.11(a) is a service rendered by the FCC to the cable operators, and the agency is fully justified in seeking reimbursement of any expenses incurred in performing that service." *Id.* Under the court's reasoning, the FCC "service" is to permit the cable companies to operate at all.

In *Electronic Industries Ass'n v. FCC,* 554 F.2d 1109, (D.C. Cir. 1976), the companion case to *National Cable II,* the court elaborated upon the types of services provided to regulated entities for which an agency may assess a fee under the IOAA. While "service" is defined in Budget Circular No. A-25, *supra,* to include a "license to carry on a specific business" or "assuring public confidence in the business activity of the beneficiary," the court expanded "service" to include assisting beneficiaries in complying with a statute:

> [An agency] is entitled to charge for services which assist a person in complying with his statutory duties. Such services create an independent private benefit. . . . Although [the statute at issue] was enacted in order to protect the public against excessive or unreasonably discriminating or preferential charges, that result is only an incidental benefit from the *service* which is rendered by the agency, i.e., assisting the carriers in complying with the statute.

Id. at 1115.

In *Mississippi Power & Light Co. v. NRC,* 601 F.2d 223 (5th Cir. 1979), the court considered the precise issue raised by the petitioners in the case at bar. Petitioners in *Mississippi*

Power challenged the NRC's entire fee schedule which is designed to recover the costs for processing applications, permits, and licenses as well as the costs arising from health and safety inspections and statutorily mandated environmental and anti-trust reviews. Petitioners argued that the NRC was without legal authority to assess *any* fee against an applicant because all of the NRC's activities furthered the "public interest" and therefore any charge assessed must necessarily be a tax.

After reviewing the legal precedents with respect to the IOAA, the court reasoned as follows: "A license from the NRC is an absolute prerequisite to operating a nuclear facility, and as such, is a benefit 'not shared by others members of society.' . . . [T]o accept petitioners' argument would mean that no Federal agency could assess any fees, since all public agencies are constituted in the public interest." *Id.* at 229.

Finally, in *Nevada Power Co. v. Watt,* 711 F.2d 913 (10th Cir. 1983) we considered the validity of a fee assessed by the Department of the Interior to cover the cost of an environmental impact statement (EIS) when an application for right of way under the Federal Land Policy Management Act (FLPMA) triggers the National Environmental Policy Act (NEPA). In response to the utilities' argument that an EIS inures solely to the benefit of the general public, we held that because the EIS is a necessary prerequisite to the receipt by the applicant of a special benefit—the grant of a right of way—"Interior is not restrained by the doctrine laid out in *National Cable* and *New England Power Co.* from charging the full cost of such EIS to the applicant." *Id.* at 930.

The analysis in these cases disposes of petitioners' argument that the fees established by FERC are not authorized under the IOAA as a matter of law because the agency's services benefit the public. As these cases made clear, where an agency performs a service from which a regulated entity derives a "special benefit," it may charge a fee, even though the public also benefits. Moreover, the term "special benefit" is broadly defined to include even assisting regulated entities in complying with regulatory statutes. *Electronic Industries Ass'n,* 554 F.2d at 1115.

We hold the petitioners' "public benefit theory" does not preclude the FERC from assessing fees as a matter of law if "special benefits" to a regulated entity can be reasonably inferred from an agency's regulatory scheme. "Special benefits" are broadly defined and as long as they are identified the regulatory agency is authorized to assess fees for its costs in conferring these "benefits." As our discussion below will show, the FERC rules under review impose fees for services to the petitioners which under the FERC regulatory scheme will enable the petitioners to engage in their respective activities or to comply with the NGA or the NGPA. Thus, we cannot hold as a matter of law that FERC was without authority to establish fees for its services in promulgating orders 360, 361, 394 and 395.

III. RULEMAKING

Petitioners contend that the Commission acted improperly in several respects in promulgating the rules under review. We reiterate that we must uphold the Commission's action unless we find they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). "Regulations must be set aside if they are arbitrary, capricious or an abuse of discretion, 5 U.S.C. § 706(2)(A), or if the agency has acted in excess of its statutory jurisdiction, 5 U.S.C. § 706(2)(C). Deference is accorded administrative regulations. *Conway v. Watt,* 717 F.2d 10th Cir.). This court has frequently applied the "rational basis" standard to agency actions." *Wyoming Hospital Ass'n v. Harris,* 727 F.2d 936, 938-39 (10th Cir. 1984). "A reviewing court may not substitute its judgment for an agency's and must affirm an agency's decision if a rational basis for it is presented." *KCST-TV, Inc. v. FCC,* 699 F.2d 1185, 1191 (D.C. Cir. 1983) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971)).

Petitioners contend that even if we deem the fees to be authorized under the IOAA, which we do, the Commission has failed to include evidence in the record to demonstrate that the

Commission's services confer a benefit on the regulated entities. Our review of the record reveals that the Commission did identify the benefits it confers on fee payors when it promulgated FERC orders 360, 361, 394, and 395. (R., Vol. I., pp. 4-8; R., Vol. II, pp. 7-12; R., Vol. III, pp. 6-10; R., Vol. IV, pp. 4-8.) For example, in its *Notice of Proposed Rulemaking* for FERC order 360, the Commission noted that "[a] blanket small producer certificate under section 7 (c) of the NGA benefits the applicant by exempting the applicant from certain otherwise applicable filing requirements." (R., Vol. I, p. 6.)

Another benefit the Commission noted concerned the issuance of a Certificate of Public Convenience and Necessity: "A Certificate of Public Convenience and Necessity under Section 7(c) benefits the applicant by allowing the applicant to engage in the business of sale or resale of natural gas. Without a Certificate, a producer would be precluded by Section 7(c) of the NGA from selling natural gas for resale in the interstate market." *Id.* The Commission also stated that it was not including certain costs in determining its fees. "As mentioned above, the Commission is not proposing in this rulemaking to charge fees for other actions it takes relating to gas producers under the NGA. These actions include preliminary and formal enforcement of investigations, settlement and administrative litigation, news releases, litigation in the courts, and rulemakings." (R., Vol., I p. 7.)

For each of the rules we are asked to review, the Commission identifies the benefits which it believes are conferred upon the regulated entity applying for the Commission's services. It appears from the record before us that the Commission gave careful consideration to the requirements of the IOAA. We hold that the Commission did not act arbitrarily or capriciously in demonstrating that its services confer a benefit on fee payors.

Petitioners next contend that the Commission is required to apportion the fees between regulated industries and the public; in other words, the fees must reflect the value of the service conferred on the regulated entities and the Commission must exclude from the fees expenses incurred to serve an independent public interest. We considered this very argument in

Nevada Power, supra. Relying on the analysis in *Mississippi Power, supra,* we held that under the IOAA and controlling precedents, the *full costs* of providing a service to regulated entities can be assessed regardless of the benefit flowing to the public.

> The utilities argue that *National Cable* and *New England Power Co.* support their EIS argument, reasoning that an EIS primarily benefits the public and thus cannot be charged to an applicant. Interior disagrees, citing *Mississippi Power* . . . . In *Mississippi Power,* the Fifth Circuit examined both *National Cable* and *New England Power Co.,* and then held that the NRC could "recover the *full cost* of providing a service to an identifiable beneficiary, regardless of the incidental public benefits flowing from the provision of that service." . . . Accordingly, the court held that the Commission could recover from a license applicant the full costs of conducting environmental reviews required under NEPA "because they are a prerequisite to the issuance of a license . . . . The Commission must conduct these reviews before it can issue a license to an applicant; it is a necessary part of the cost of providing a special benefit to the licensee. In other words, it is 'incident to a voluntary act.' " . . . It It mattered not that there was an "obvious public benefit flowing from the preparation of these environmental reviews."

711 F.2d at 930 (citations omitted).

We again reject the argument that an agency may not assess the full cost of its services against a regulated entity. We uphold the amount of the Commission's fees in FERC orders 360, 361, 394, and 395.

Petitioners next contend that the Commission's rules unlawfully prohibit them from recovering the cost of these fees from the consumers by increasing statutory price ceilings. Petitioners argue that by refusing to permit cost recovery, the Commission has violated the "just and reasonable" standard of

the NGA and has unlawfully reduced prices established under the NGPA. Petitioners maintain that they are entitled to recover prudently incurred costs necessary to perform price regulated services.

Under 15 U.S.C. §§ 3314(b)(2), 3316(c), and 3320(a)(2) the petitioners argue that they are *entitled* to have the ceiling prices increased to a just and reasonable level taking into consideration the Commisison's new fees. The language of the NGPA makes it clear, however, that an increase in ceiling prices, for whatever reasons, is wholly within the discretion of the Commission. The Commission considered the petitioners' contention and rejected their arguments. (R., Vol. I, p. 305.) Under the circumstances, we hold that the Commission's decision refusing to permit the petitioners to pass the cost of the fees onto their consumers is not arbitrary, capricious or contrary to law.

Finally, petitioners contend that the "direct billing procedure" established by the Commission in orders 360, 361, 394, and 395 is unlawfully vague because the Commission failed to state specific standards for determining when a tariff filing will trigger "direct billing." The Commission describes the "direct billing procedure" in order 361, "Final Rule." This description also applies to the direct billing procedure provided in the other orders.

> [T]he Commission occasionally receives filings which are not average. These filings may be extensive in scope and present factual, legal, or policy issues of such complexity that the Commission may devote an extraordinary amount of time and effort to processing them. In addition, there may not be a truly representative average due to the small number of filings in a particular area.
>
> The standard fees established in this rule bear no reasonable relationship to the actual costs of processing those extraordinary and atypical filings. Moreover, if the costs of processing extraordinary filings are included in the costs associated with average filings, persons submitting average filings would be

> subsidizing those submitting the extraordinary filings. Therefore, in the case of an extraordinary filing, the Commission reserves the option of ordering a direct billing procedure at the beginning of processing the filing or at any time up to one year after receiving a complete filing. As discussed above, in the case of petition seeking advance Commission approval of rate treatment of research, development, and demonstration of expenditures, the Commission has decided to use direct billing for the entire fee category due to the unavailability of reliable data to establish an average fee.
>
> Under the direct billing procedure, the Commission will periodically bill the entity who submitted the filing for all the direct and indirect costs incurred by the Commission in processing the filing, unless a lesser amount is determined to be fair and equitable. The staff resources devoted to processing a filing resulting in a direct billing will be separately recorded and will not be included in the work-months associated with processing average filings. This final rule also requires the Commission to credit an applicant whose filing becomes subject to direct billing with any fee paid under this fee system.

(R., Vol. II, pp. 325-27.)

We hold that the "direct billing procedure" established in orders 360, 361, 394, and 395 is in accord with the IOAA and controlling law, and the Commission's procedure is not arbitrary or capricous. We have previously held that a regulation promulgated by an administrative agency charged with the administration of an Act (the IOAA) has the force and effect of law if it is reasonably related to administrative enforcement and does not contravene statutory provisions. *United States v. Barnard,* 255 F.2d 583 (10th Cir. 1958). Based on the scheme provided for processing and assessing fees for "average filings," we do not believe the direct billing procedure is a pretext for fees which the Commission "arbitrarily" decided not to establish.

Petitioners also raise several peripheral arguments which we find to be without merit. In summary, we hold that the Commission has the authority to recover the full costs of providing services to identifiable beneficiaries under the IOAA. We uphold the fees promulgated by the Commission as being consistent with this principle. We also hold that the Commission did not act arbitrarily, capriciously, or beyond legal authority in establishing the fees and promulgating orders 360, 361, 394, and 395 and in setting the fees at issue.

AFFIRMED.

SECTION B

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[18 C.F.R. Parts, 154, 381]

FEES APPLICABLE TO NATURAL GAS PIPELINE RATE MATTERS

Docket No. RM 83-2-000

ORDER NO. 361

(Issued February 6, 1984)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission is amending its regulations to establish fees for the services and benefits it provides pipelines with regard to pipeline rate matters under the Natural Gas Act. This is the second of a series of rules to be issued on fees. These fees are authorized by the Independent Offices Appropriations Act. That Act provides for the collection of fees to make agencies "self-sustaining to the full extent possible."

EFFECTIVE DATE: This rule will become effective [insert 75 days from date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT:

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioner:

Raymond J. O'Connor, Chairman;
Georgiana Sheldon, J. David Hughes,
A. G. Sousa and Oliver G. Richard III.

FEES APPLICABLE TO NATURAL GAS PIPELINE RATE MATTERS

Docket No. RM83-2-000

ORDER NO. 361

FINAL RULE

(Issued February 6, 1984)

I. INTRODUCTION

The Federal Energy Regulatory Commission (Commission) is adding a new Part 381 to its regulations to establish fees for services and benefits provided to natural gas pipelines under the Natural Gas Act (NGA) and related authorities.[1] This rule establishes the following fees for pipeline rate matters: (1) tariff filings for general changes in rates and for changes other than in rates, $2,000; (2) tariff filings that track certain changes in costs, $2,300; and (3) petitions seeking advance approval of rate treatment of research, development, and demonstration expenditures, directly billed.

This rule is the companion rule to Docket No. RM83-2-000, which sets the fees for NGA producer matters. Together, these rules establish a major part of the Commission's fee structure for activities under the NGA and are key parts of the

[1] 15 U.S.C. §§ 717-717z (1976 & Supp. V 1981). The Natural Gas Policy Act (NGPA), 15 U.S.C. §§ 3301-3432 (1976 and Supp. V 1981) relates to the fees in this rule with respect to the Commission's jurisdiction over costs associated with purchase gas adjustments, incrementally priced gas, and transactions under section 311 of the NGPA.

Commission's ongoing program to establish fair and equitable fees for the services and benefits provided to those entities subject to the Commission's regulatory jurisdiction.

II. BACKGROUND

The Commission is authorized under the Independent Offices Appropriation Act of 1952 (IOAA) to establish fees for services and benefits it provides.[2] The IOAA provides in pertinent part:

> [A]ny work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation . . . to prescribe therefore such fee, charge, or price, if any, which he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration the direct and indirect costs to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amounts so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts . . . .

The principal interpretation of the IOAA is Bureau of the Budget Circular A-25,[3] which states that a fee should be assessed for each measurable unit or amount of government

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[2] Act of Aug. 31, 1951, Ch. 376, Title V, § 501 65 Stat. 290, *as codified*, 31 U.S.C. § 483(a) (1970).

[3] Bureau of the Budget Circular A-25 (September 23, 1959). This interpretation has been cited by the United States Supreme Court as "the proper construction of the Act." FPC v. New England Power Co., 415 345, 351 (1974).

service or property from which an identifiable recipient derives a special benefit.[4]

In accordance with the IOAA and authoritative interpretations of that statute,[5] the Commission, in establishing any fee, must:

(a) identify the service for which the fee is to be assessed;

(b) explain why that particular service benefits an identifiable recipient more than it benefits the general public;

(c) base the fee on as small a category of service as practical;

(d) demonstrate what direct and indirect costs are incurred by the Commission in rendering the service, and show that those costs are incurred in connection with the service rendered to the beneficiary; and

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[4] Budget Circular A-25, at 1-2:

General Policy. A reasonable charge . . . should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit . . . . For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

a. Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insurance, or a license to carry on a specific business); or

b. Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft) . . . .

c. Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate or an inspection after regular duty hours).

[5] *See* National Cable Television Association, Inc. v. United States, 415 U.S. 336 (1974); FPC v. New England Power Co., 415 U.S. 345 (1974); Mississippi Power & Light v. NRC, 601 F.2d 223 (5th Cir. 1979); National Cable Television Association, Inc. v. FCC, 554 F.2d 1094 (D.C. Cir. 1976); Electronic Industries Association v. FCC, 554 F.2d 1109 (D.C. Cir. 1976); National Association of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976); Capital Cities Communications, Inc. v. FCC 554 F.2d 1135 (D.C. Cir. 1976).

(e) set a fair and equitable fee for the service. For the reasons detailed below, the Commission believes that the fees set forth in this final rule meet these requirements of the IOAA.

III. SUMMARY AND ANALYSIS OF COMMENTS

The services and benefits provided to pipelines under the NGA for which the Commission is instituting a fee are the following:

1. $2,000 for Commission review of pipeline tariff filings for general changes in rates and for changes other than in rates under section 4 or section 5 of the NGA, filed in accordance with 18 C.F.R. § 154.63.

2. $2,300 for Commission review of pipeline tariff filings that track certain changes in costs under section 4 or section 5 of the NGA, filed in accordance with 18 C.F.R. § 154.38 or pursuant to approved tariff provisions, orders of the Commission or settlement agreements with the Commission.

3. Direct billings for Commission review of petitions seeking advance Commission approval of rate treatment of research, development, and demonstration expenditures filed in accordance with 18 C.F.R. § 154.38(d)(5).

A. Description and Identification of Services Related to Pipeline Filings

At the outset, the Commission can identify a variety of services and activities that provide direct benefits to the applicant involved, as required under the IOAA and Budget Circular A-25. Without the performance of these services, the applicants would not be able to transport and sell gas. Therefore, the applicants involved are the recipients of special benefits that have more immediate value than those which accrue to the general public.

(1) Tariff Filings

Commission acceptance of tariff filings that involve general changes in rates permits the pipeline to make the following changes[6] in rates: (1) general rate changes (increases or decreases) that affect the level for most, if not all, of the services provided by the pipeline and will enable it to recover its costs and earn a fair rate of return on jurisdictional sales;[7] and (2) minor rate increases that usually relate to a few rate schedules and are designed to bring them into harmony with general tariff policy, to eliminate inequities, or to achieve other formal adjustments. A pipeline must submit any change in its rates to the Commission for its review and acceptance.

Commission acceptance of tariff filings for changes other than in rates allows the pipeline to amend an existing gas tariff to change the terms and conditions of service. Such filings, if accepted by the Commission, permit changes in the general terms and conditions of the tariff, rate schedules, service agreements and other miscellaneous tariff provisions, none of which changes any rate level or generates a change in annual revenues.[8] A pipeline must submit any change in its gas tariff to the Commission for its review and acceptance.

Natural gas pipeline tariff filings are processed principally by the Office of Pipeline and Producer Regulation (OPPR) and the Office of General Counsel (OGC). A notice of the filing is published in the *Federal Register*. The filing is analyzed from a legal and technical standpoint to determine whether the proposed changes comply with the Commission's requirements for natural gas pipeline tariff filings, and, in the case of tariff filings that involve general changes in rates, whether the changes are consistent with the statutory "just and reasonable" standard.

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[6] 18 C.F.R. § 154.63(a)(2)-(4)(1983).

[7] Sections 4 and 5 of the NGA, 15 U.S.C. §§ 717c, 717d (1976 & Supp. V 1981).

[8] The Commission has incorporated into the proposed fees for pipeline certificate applications the costs incurred in reviewing tariff filings that relate directly to a natural gas pipeline certificate authorization or amendment thereto. Therefore, the Commission is not, in this rulemaking, assessing a separate fee for tariff filings submitted in connection with a pipeline certificate application.

If the filing is determined to comply with all statutory and regulatory requirements and is uncontested, the Commission staff prepares a letter order accepting the changes, together with a memorandum in which the staff summarizes the filing and the responses to the public notice, analyzes the filing, and makes a recommendation to accept the changes. The letter order and memorandum are sent either to the Commission or to the Director of OPPR for consideration. If the recommendations of staff are accepted, the letter order is issued by the Commission or by the Director of OPPR pursuant to delegated authority.

If the changes are found not to comply fully with applicable statutory and regulatory requirements, staff prepares a memorandum to the Commission in which staff summarizes the filing and the responses to the public notice, analyzes the filing, and makes recommendations whether to suspend the filing and set the matter for hearing. If the Commission does not set the matter for hearing, a letter order accepting the changes is issued either by the Commission or by the Director of OPPR pursuant to delegated authority.

In those cases where the Commission agrees with the staff recommendation to set the matter for hearing or determines that a genuine issue of material fact exists, the tariff filing is suspended and the case is set for hearing before an administrative law judge.

(2) Tracking Filings

Another category of tariff filings permits the pipeline to adjust its rates for certain costs without the need to support the level of all other costs. These so-called "tracking filings" are treated separately for purposes of fees. Natural gas pipelines pass through certain "tracked costs" (such as for purchased gas) to their customers on the basis of the costs incurred.[9] The pipelines are reimbursed dollar-for-dollar for these tracked costs. Although the pipelines make no profit from pass-through

[9] The Commission has the responsibility under sections 4 and 5 of the NGA to ensure that all rates charged by pipelines for the interstate transportation and sale of natural gas are just and reasonable, regardless of whether these rates are established by general rate change filings or by tracking filings.

of these costs, they avoid the attrition in earnings that would otherwise occur without tracking authority. In permitting pipelines to track certain costs for pass-through, the Commission has found that the nature of these costs is sufficiently distinguishable from other costs so that they can be tracked without jeopardizing the overall relationship between costs and revenues. Even so, this relationship is subject to periodic review. *See, e.g.,* 18 C.F.R. § 154.38(d)(4)(vi) (1983). The tracking filings themselves are subject to thorough review and analysis to ensure that only the proper costs are being tracked.

Tracking filings are also processed principally by OPPR and OGC. A notice of the filing is published in the *Federal Register.* The filing is also analyzed from a legal and technical standpoint to determine both if it meets the Commission's filing requirements and if the comports with the provisions of any approved tariff Commission order or settlement agreement which the tracking filing is intended to implement.

If the filing is determined to comply with all the above requirements and is uncontested, the Commission staff prepares a letter order accepting the tracking filing, together with a memorandum in which staff summarizes the filing and makes a recommendation to accept the tracking filing. The letter order and memorandum are sent either to the Commission or to the Director of OPPR. If the recommendations of staff are accepted, the letter order is issued either by the Commission or by the Director of OPPR pursuant to delegated authority.

If the tracking filing is found not to comply fully with applicable statutory and regulatory requirements or not to implement properly the provisions of approved tariff provisions, Commission orders, or settlement agreements, the staff prepares a memorandum to the Commission in which the staff summarizes the filing and the responses to the public notice, analyzes the filing, and makes a recommendation whether to suspend the filing and set the matter for hearing. If the Commission decides not to set the matter for hearing, a letter order accepting the tracking filing is issued either by the Commission or by the Director of OPPR pursuant to delegated authority. In those cases where the Commission agrees with the staff recommenda-

tion to set the matter for hearing or determines that a genuine issue of material fact exists, the tracking filing is suspended and the case is set for hearing before an administrative law judge.

The NOPR proposed to recover the Commission costs associated with audits and refunds as they relate to tracking filings. However, the Commission now believes that it cannot reasonably find a particular identifiable benefit to the applicant in these services. For that reason, the Commission has excluded these costs from the calculation of the fee for tracking filings.

(3) Research, Development, and Demonstration Expenses

Petitions that are filed by the pipelines, groups of pipelines, or entities acting on behalf of pipelines to obtain advance Commission approval for pass-through of research, development, and demonstration expenditures are processed by OPPR. A notice of the filing is published in the *Federal Register*. The staff reviews the proposed projects and submits a memorandum to the Commission examining whether the expenditures are "valid, justifiable, and reasonable"[10] and, therefore, should be allowed to be passed through to the pipeline's jurisdictional customers. The Commission then considers the matter and issues an order either accepting or rejecting the petition, in whole or in part.

The Gas Research Institute, acting on behalf of its member pipelines, regularly files petitions to obtain advance Commission approval of its research, development, and demonstration expenditures. When the Gas Research Institute files such a petition, the Commission follows a special procedural schedule. The staff prepares a report in which it summarizes the proposed projects and discusses whether the expenditures are "valid, justifiable, and reasonable" and whether pass-through of the costs should be allowed. The report is sent to all intervenors.[11] Reply comments on the report from intervenors and final comments from the Gas Research Institute are then submitted

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[10] 18 C.F.R. § 154.38(d)(5)(1983).

[11] All state public utility commissions and all members of the Gas Research Institute automatically are made intervenors.

to the Commission. The Commission then issues an order either accepting or rejecting the Gas Research Institute's petition, in whole or in part.

(4) Hearings

The Notice of Proposed Rulemaking (NOPR), 47 F.R. 57943 (December 29, 1982), also proposed a fee structure that included charging for hearings held in connection with the categories of services involved in this rule—tariff filings that involve general rate changes, tariff filings for changes other than in rates, and tariff filings that track changes in costs. For several reasons, the Commission has decided not to charge fees to recover the costs of hearings related to the fee categories established in this rule.

First, a number of commenters contend that if the Commission chooses to charge a fee for tariff filings that are set for hearing, the Commission should charge a portion of that fee to parties which intervene. It is true that, in some instances, the intervenors raise issues related directly to their own welfare and not so related to overall public interest considerations. At other times, intervenors may be protecting the public interest to a greater extent than any identifiable recipient. Thus, it might be appropriate to charge intervenors, but only if the Commission expends the effort to distinguish between these two situations. This administrative obstacle complicates considerably the ability of the Commission to establish fee categories that include recovery of hearing costs.

Second, the Commission customarily does not track the time it spends on hearings on a case-by-case basis. Thus, it is not possible under the present circumstances to determine precisely how much of each hearing fee would be related directly to intervenors.

Third, the Commission believes that the range of complexity among hearings is so great that an "average hearing fee" might be viewed as unduly burdensome on many parties. If hearing costs are tracked more closely on a case-by-case or type-by-type basis, any potential inequity from an averaging approach can be avoided.

The above reasons outline the administrative and practical problems for the Commission to charge for hearings in the present circumstances. Even though the Commission, in its discretion, has decided not to do so at this time.

Therefore, this rule does not include a separate hearing fee category and does not include costs associated with hearings in any of the fee categories that are specified in this rule. The Commission may in the future reconsider its position on this point. Meanwhile, the Commission does retain the right to directly bill [*see* Section III. H below] an applicant for the costs associated with a hearing in the pipeline area where the hearing provides a private benefit to an identifiable recipient and where the hearing requires an extraordinary amount of Commission time and effort to process.

(5) Other Considerations

The Commission is not establishing in this rulemaking fees for a number of other activities related to natural gas pipeline rate matters. Those actions include rehearings, declaratory orders, rulemakings, preliminary and formal enforcement investigations, enforcement-related settlements and litigation, news releases, and litigation in the courts. As for preliminary and formal enforcement investigations, enforcement-related settlements and litigation, news releases, and litigation in the courts, the Commission believes that these actions generally result in a benefit to the public at large, and do not manifest the necessary, identifiable benefit to an individual entity. This is especially true in enforcement related matters.

As for rulemakings and declaratory orders, while the Commission believes that these actions might warrant fees, the Commission has decided not to establish a separate fee category for these items as they pertain to NGA pipeline rate matters.[12] Finally, as for rehearings, in those cases where a petitioner for rehearing is seeking a private benefit, the Commission believes that it could charge a fee for reviewing that

[12] The Commission is considering, in other rulemakings, both fees for declaratory orders under all of its jurisdictional statutes and fees to recover the costs of certain rulemakings. In those cases, the Commission believes that there are special benefits provided to identifiable recipients.

petition. However, there are also cases where an entity's petition for rehearing raises issues that are primarily in the public's interest. In those cases, the Commission does not believe it would be reasonable to impose a fee. Due to the administrative burden that would be involved in trying to segregate which petitions could be charged, the Commission has decided not to set a fee for petitions for rehearing or to include the costs associated with rehearings into the fee categories established in this rule.

B. Special Benefits to Identifiable Recipients

In delineating the services or benefits for which agencies are permitted to charge under the terms of the IOAA, Budget Circular A-25 states that a fee may be charged to an identifiable recipient who derives a special benefit from a Government service.[13] In addition, the circular states that a "special benefit" has accrued if the recipient obtains "more immediate or substantial gains or values than those which accrue to the general public." [14]

All of the commenters argue that there are no special benefits to natural gas pipelines that will substantiate a fee. Furthermore, many claim it is the public that receives the benefits of these filings. And, they say, it is the Commission's responsibility under the IOAA to show that the pipelines are receiving the benefits of these Commission services.

These arguments have previously been rejected in *National Cable Television Association, Inc. v. FCC,* 554 F.2d 1094 (D.C. Cir. 1976), and *Mississippi Power & Light v. NRC,* 601 F.2d 223 (5th Cir. 1979). In response to the argument put forth by cable television operators that they receive no benefit from an FCC license because the cable television industry would have developed better without FCC regulation, the D.C. Circuit in *National Cable Television* said "[a]ll that may be true, but these distinctions have no relevance here. The fact is that the FCC has undertaken to regulate this industry and has so far been sustained by the Supreme Court in this endeavor, with the

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[13] Budget Circular A-25, at 1-2.

[14] *Id.* at 2.

result that a certificate of compliance has become a necessary and therefore valuable license." [15] The Fifth Circuit in *Mississippi Power & Light* similarly held that since a license from the NRC is an absolute prerequisite to operating a nuclear facility, that license is a benefit not shared by other members of society.[16] Hence, the Commission believes this issue has been settled by the courts and need not be the subject of further discussion in this rule.

In a similar vein, two commenters contrast the Commission's fees to those of the NRC. These commenters contend that while an NRC license receives a special benefit (for example, the ability to construct and operate a nuclear facility), a pipeline filing a tariff or rate change does not receive any similar benefit. Instead, the commenters claim a ratemaking proceeding under the NGA primarily protects the public's interest.

While consumers may be ultimate beneficiaries from the regulation of natural gas, that is not determinative of the Commission's right to charge fees under the IOAA. The IOAA provides for the collection of fees for any "work, service, publication, document benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility." [17] Processing pipeline rate filings is the type of service for which the IOAA expressly authorizes the collection of fees. Not only is the statute clear on its face, but the D.C. Circuit has held that a fee otherwise authorized by the IOAA is not rendered invalid because the public may also enjoy downstream benefits.[18]

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[15] 554 F.2d at 1101-02.

[16] 601 F.2d at 229.

[17] 31 U.S.C. § 483(a) (1970).

[18] Electronics Industries Ass'n v. FCC, 554 F.2d 1109, 1115 (D.C. Cir. 1976). In that case, petitioners argued that fees should not be assessed for tariff filings or equipment testing and approval. The court answered that even though both activities were required by statute, the FCC was entitled to charge for services which assisted a person in complying with his statutory duties. Such services, the court said, create an independent private benefit since they provide a means for the carrier to obtain its revenues and to regulate subscriber use of its facilities. The court concluded that although the statute was enacted in order to protect the public against excessive or unreasonably discriminating or preferential charges, that result is only an incidental benefit from the service which is rendered by the agency, *i.e.* providing the means for carriers to comply with the statute.

Furthermore, while it is true that in 1965 the Federal Power Commission took an opposite approach toward fees,[19] that approach does not prevent this successor Commission from adopting a different policy. Not until the 1970's did the courts begin reviewing fee systems of various agencies. Since those cases were decided and the law became sufficiently clear, the Commission now believes that it can reasonably charge fees for the services and benefits provided to specific applicants.

C. Smallest Practical Unit

In designing a fee schedule, the Commission should establish fees on the smallest unit or category of service that is practical. In remanding fees established by the FCC, the United States Court of Appeals for the D.C. Circuit set forth the most authoritative interpretation of this IOAA requirement as follows:

> [W]e interpret the statute and the Supreme Court decisions to require reasonable particularization of the basis for the fees, accomplished by an allocation of costs to the smallest unit that is practical. In most cases, we expect this unit will be classes of carriers or applicants or grantees or services which the Commission has already singled out for separate treatment in its 1975 fee schedule. Classification is always a difficult problem, involving as it does the drawing of lines; but the solution is not to group dissimilar entities together. The Commission must examine its expense and set forth the maximum particularization of costs which it conveniently can make, so that the correctness of its actions can be reviewed.[20]

Further, Budget Circular A-25 states that "costs shall be determined or estimated from the best available records in the agency, and new cost accounting systems will not be established solely for this purpose."[21]

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[19] 30 Fed. Reg. 12,077 (Sept. 15, 1965).

[20] Electronic Industries Association v. FCC, 554 F.2d 1109, 1116-17 (D.C. Cir. 1976).

[21] Budget Circular A-25, at 3.

The Commission, in keeping with Budget Circular A-25, is classifying its fees by types of applications or filings. The Commission has calculated its fees from its Management Information Systems (MIS). The MIS is an agency system established to track workload. The MIS tracks time, by work-months, based on types of applications or proceedings. The Commission is establishing one fee for an entire filing or proceeding because that filing or proceeding is the smallest unit practical for the Commission to develop fees.[22] In the NOPR in this docket, the Commission stated that it anticipated establishing two separate fee categories for tariff filings for general changes in rates and for tariff filings for changes other than in rates. After calculating the time spent on these two areas and the resulting fees, the Commission found the fees to be so nearly identical that, for logical and administrative efficiency reasons, only one fee category for both activities is being established. The Commission will continue to monitor these two subparts of the single category, however, and will establish two different fees if necessary in the future.

D. Basis of Cost Recovery

1. Direct and Indirect Costs Included

The Commission's fee schedule is designed to account for all types of recoverable costs associated with the processing of the specified applications and filings under the NGA. The costs attributable to a particular Commission service are not merely the salaries of the employees who review the applications or filings. The attributable costs include the direct salary costs as well as the substantial amount of indirect costs which the Commission expends in its reviews. As the Fifth Circuit has stated, employees

> . . . must be supplied with working space, heating, lighting, telephone service and secretarial support. Arrangements must be made so that . . . [they are]

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[22] The Commission has recently updated the MIS by starting to tract its workload on a new system (Time Distribution Reporting System) which may provide an even greater degree of accuracy of Commission workload. At this time, however, the Commission does not have year's worth of data to develop actual fees from the new system.

> hired, paid on a regular basis and provided specialized training courses. Those and other costs such as depreciation and interest on plant and capital equipment are all necessarily incurred in the process of reviewing an application.[23]

Accordingly, the Commission has included in its identification of costs the following items: salaries and benefits; travel; transportation of things; rents; communications and utilities; printing; other support services; supplies; and equipment.

2. Methodology

(a) Underlying Considerations

The Commission's calculation of the costs of providing each of the services represented by a fee category is directly related to the amount of time the Commission spends providing each of the services. The fees in this rule are based on information obtained through the Commission's Management Information System (MIS), which provides the amount of time spent on all Commission functions. The functions are grouped into categories which represent the Commission's various programs, including gas wellhead pricing, gas pipeline rates, gas pipeline certificates, gas producer certificates, gas producer rates, oil pipeline regulation, hydropower regulation, and electric power regulation. The MIS workload data is recorded on a monthly basis.

With respect to each function, the supervisor in that area records for the MIS the number of projects initiated (receipts) and completed (completions) in a particular time period. Most Commission functions can be measured in terms of the number of projects initiated and completed. In accordance with Commission practice, these projects are generally assigned docket numbers and, for purposes of this discussion, will be referred to as "docketed activities". The supervisor in each organization unit reports to the MIS the amount of time spent by staff on each functional category in terms of work-months. A "work-month" is the unit of work represented by one employee's devotion of 100% of his or her time for one month.

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[23] Miss. Power & Light v. NRC, 601 F.2d at 232.

Time sheets are coded by functional activity and are filled out Commission-wide every two weeks. The supervisor merely checks employee time sheets for accuracy in coding.

Support functions regularly undertaken, with respect to any program, are not docketed and may not be measured in terms of receipts and completions. The nature of these functions makes impractical any measurements in terms of receipts and completions, but these functions are nevertheless essential to the completion of any docketed activity. This time is also allotted and reported by unit supervisors in terms of work-months.

Only those support activities that are related to providing a benefit are included in the calculations. These support functions will be referred to as "support activities" and can be divided into three categories. First, there are support activities that involve general supervision, personnel management, and routine administrative functions such as maintenance of time and leave records, the handling of property and supplies, staff meetings, and the planning and organizing of leave. This category can be labeled as "administrative services" and is included for fee recovery because it is essential to the FERC's ability to complete docketed activities.

Second, support staff responds to requests for information that may not contribute directly to the completion of a docketed activity. Examples include requests for information from the public, from the Congress, from the General Accounting Office, and from other governmental agencies. The Commission has excluded from its calculation of fees the work-months associated with this second category of "inquiries and internal communications" because this type of support activity is not involved in completing docketed activities.

Third, support staff established or reviews certain Commission operations and procedures. This is "technical management and operations." These activities include work on the FERC budget, management information systems, and program development functions such as special studies or briefings on relevant subjects, but which are identified with just one docketed

activity. This category is therefore an integral part of completing docketed activities.

(b) Calculation of Fee Amounts

For purposes of this rule, the Commission has used the following methodology to determine the cost of providing any service or benefit. First, the work-months reported for a class of docketed activity are added to a pro-rata share of the work-months reported for the relevant support activities for that activity. This figure, representing the total number of work-months dedicated to a class of docketed activity for a year, is divided by the number of completions for that year for the given activity. The resulting quotient represents the average number of work-months required to complete one proceeding in that given class of docketed activity.

Second, the Commission used the following data provided by its Office of Program Management to figure the average cost of a work-month, based on the Commission's FY 1983 actual costs.

Salaries and Benefits	
Based on year and payroll data and benefits @ 26%	$46,228
Travel	726
Transportation of Things	7
Rents, Communications & Utilities	3,185
Printing	1,899
Other Services—excludes direct program contracts	4,684
Supplies	477
Equipment	42
Total	$57,248

The total was divided by 12 to yield an average work-month cost of 4,770.67.

Third, in order to determine the cost of an activity, the Commission multiplied the average cost per work-month by the average number of work-months required to complete the activity.[24]

There were numerous complaints about the cost methodology proposed in the Notice of Proposed Rulemaking, such as inadequate information to verify the costs, calculations based on salary and overhead from one year and time per project from another year, use of budgeted figures as opposed to actual figures, use of average work month costs; use of only one year for determining fees, and use of number of completions per year to determine the fees.

As for what costs are permissible for inclusion, the IOAA provides for the collection of fees which include both direct and indirect costs to the Government. Thus, there is no reason to exclude any item except for support functions relating to inquiries and internal communications, as discussed above. Second, in devising its fee schedule, the Commission is authorized to "determine or estimate [its costs] from the best available records in the agency." [25] For this Commission, that means the MIS.

The Notice of Proposed Rulemaking used 1982 budgeted figures to determine its costs, and 1981 actual completions and work-months in the fee calculation. Further, the method of updating the fees was tied to 1981. Each subsequent year was to be adjusted by the change in costs between the base year and the year in consideration. Many commenters argue that 1981 may not be a typical year for completions and work-months, and thus, should not be the base year. The Commission agrees with this argument, and believes it is much more accurate to calculate fees from actual completions and work-months, as well as actual costs. The Commission has decided to use actual fiscal year figures in this rule as well as in updating the fees in subsequent years (see section III E. below). This approach keeps data more current, and is more representative of what

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[24] Updated data sheets have been placed in the Commission's Public File Room detailing the calculations.

[25] Budget Circular A-25, at 3.

actual fees should be. Therefore, the Commission has calculated the fees in this rule from actual fiscal year 1983 direct and indirect costs, completions, and work-months. This is in keeping with the Commission's statement in the NOPR that it would use the most accurate and representative base year data available to establish fees. Furthermore, this approach eliminates any inaccuracies which could arise from using budgeted figures, as was done in the NOPR.

One commenter claims that the Commission should not use an agency-wide figure for determining its direct costs. Instead, it maintains, the Commission should determine pipeline fees based on the salaries of only those employees processing pipeline filings. AS permitted under the requirements of Budget Circular A-25, since the Commission's accounting system employs an agency-wide figure, the Commission has used an agency-wide figure as the basis for its costs.

Two commenters claim that "number of completions" is insufficient for determining accurate fees. They argue that the Commission should also include cases in progress; otherwise, one commenter claims the fees will exceed the costs associated with completions. By using "number of completions," the Commission is attempting to recover the full amount it spends on any filing at the time the filing is submitted. While it is true that the fee in any one year is tied to an average based on completions in the immediately preceding year, those completions are the best and most current data available on the workload of the Commission. While an unusually high or low number of completions in any given year will raise or lower the fee in the succeeding year, these completions are a reasonable barometer of where the Commission is spending its resources. Since the workload in the gas pipeline rate area is not expected to fluctuate widely, the use of completions in a year is appropriate. Furthermore, if there is an unusual number of completions in a year, that number may reflect a future trend for which the succeeding year's fees should rise or fall accordingly. Finally, this approach will not overcharge any one applicant because it is assumed that most applications are worked on in more than one year. In other words, a filing might be filed at the end of 1982, and be completed in 1983. Rather than charge two fees

(one for each year that the review of the filing is in progress), the Commission is able to charge one fee at the time of filing. Nevertheless, should a fee result, which the Commission views as being abnormally high, it may elect to use statistical averaging techniques to bring the fees to a more reasonable level.

Finally, one commenter objects to supervisors' monitoring the time spent by staff that is ultimately used to calculate Commission work-months. As was explained above, the role of the supervisor is only to check for accuracy in filling out time reporting forms. Commission employees fill out their own time reports, listing how their time was spent. This approach, which has been in operation for a little over a year, is different from that used at the NOPR stage. The Commission believes that actual time reporting by each employee is as accurate an account of how time is spent by this Commission as can be feasibly implemented.

E. Actual Fees Established and Procedures for Updating Fees

The following table summarizes for 1983 the total number of work-months, and completions, and the average cost per completion in rendering the pipeline services for which the Commission is establishing fees in this final rule.

Service	Total WM's in 1983	Total completions in 1983	Average number WM's per completion in 1983	Average cost per completion in 1983
Review of tariff filings for changes other than in rates, and general changes in rates	118.2	279	.42	$2,003.68
Review of tariff filings that track changes in costs (tracking filings)	136.35	277	.49	$2,337.63

The Commission uses the standard methodology set forth in this and other fees rulemakings to determine all of the fees for natural gas pipeline rates matters, except the fee for

petitions seeking advance Commission approval of rate treatment of research, development, and demonstration expenditures. Rather than devise a single fee for reviewing these petitions, the Commission will use the direct billing procedure to recover these costs (see section III. H. below) for the following reasons. Most of the Commission time spent in reviewing these petitions is spent reviewing petitions filed by the Gas Research Institute (GRI). However, pipelines, groups of pipelines, and entities acting on behalf of pipelines also file petitions seeking advance Commission approval of expenditures for their own projects. The projects are usually much smaller than GRI projects and require much less Commission time to review. If the Commission were to determine a fee based on the average cost per petition seeking advance approval of research, development, and demonstration expenditures, the result might be inequitable from two standpoints. On the one hand, the more lengthy GRI proceedings would tend to increase the fee for other pipeline petitions. On the other hand, the time spent on the pipeline petitions would tend to lessen the fee for GRI with the result that the other pipeline fees might be a subsidy for the cost of reviewing GRI's petitions. Therefore, the Commission will directly bill, by means of the procedures set forth in § 381.107,[26] for the costs of processing any petition seeking advance approval of rate treatment of research, development, and demonstration expenditures.

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[26] These general procedures for direct billing are discussed and promulgated in the companion final rule for NGA producer fees (Docket NO. RM82-25-000).

The following fees are therefore established:[27]

Services	Fee
Tariff filings for general changes in rates and for changes other than in rates	$2,000
Tariff filings that track changes in costs	$2,300
Petitions seeking advance approval of rate treatment of research, development, and demonstration expenditures	Direct billing

The Commission will update its fees each year to reflect the most current Commission costs. An updated fee schedule will be published annually in the *Federal Register* after the close of the preceding fiscal year. The updated fees will be based on actual completions, work-months, and costs from the preceding fiscal year. In this way, the fees will reflect, using the most current data available, the benefits to the recipients.

Many commenters contend that the fees in the NOPR would be too high for small pipelines. They also claim that the customers of small pipelines will be hurt much more than those of the larger companies, who can spread their fees among many more customers.

The Commission is required under the Regulatory Flexibility Act [28] to consider the degree of economic effect of it rules on small businesses and other small entities. The Commission has concern over a small pipeline's ability to pay for filings that included the costs of hearings (e.g., $46,000 as proposed in the NOPR for the hearing phase of tariff filings involving general changes in rates). As is discussed above, the Commission has decided not to establish fees to recover hearing costs in this rule. The Commission believes in light of that decision, small

[27] Fees are established by taking actual costs and rounding *down* to:

(1) the nearest $5 increment, if the total cost is $100 or less; and

(2) the nearest $100 increment, if the total cost is more than $100.

[28] 5 U.S.C. §§ 601-612 (Supp. V 1981).

pipelines will not be overly or unfairly burdened by the fees established in this rule. Nevertheless, the final rule does provide for a waiver in the case of severe economic hardship (see section F.2, *infra*).

F. Exceptions to Full Cost Recovery

1. Reductions in Fee Amounts by Category

The Commission has established in this rule fees which include all the recoverable costs associated with the particular benefits and services provided. The Commission, based on its expertise, recognizes that there may be instances in the future in which establishing full cost recovery fees would have an adverse effect on applicants, or would undermine Commission activities. In such cases, the Commission may exercise discretion to reduce fees to less than full cost recovery in order to prevent a disproportionate economic impact or for other good cause. Good cause would include situations where the Commission wishes to encourage use of a service, where less Commission time is required than staff time, or where there is a reduction in the amount of time required to process a filing. Any reduction in a fee would be initiated only by the Commission by rulemaking. The same percentage of reduction would carry over to subsequent years unless further notice was given by the Commission that it was altering that reduction.

A number of commenters say that the Commission's guidelines on making reductions are too vague. The Commission believes that the standards enumerated are sufficiently specific, particularly since any categorical reductions in fee amounts will be done by means of a rulemaking. In addition, economic hardship to a class of applicants will be taken into account; this factor is as specific as possible given the degree of flexibility the Commission needs in determining good cause for a categorical reduction.

2. Case-by-Case Waiver Procedure

The Commission also realizes that a different situation could arise in which an individual applicant is unable to pay fees as set by the Commission due to severe economic hardship. The Commission does not expect this to happen often in the gas

pipeline rate area since the Commission has reduced the fees significantly as a result of excluding any recovery of hearing costs. If an applicant is suffering from a period of severe economic hardship, the applicant will have the burden of presenting evidence, such as a financial statement, to the Commission showing that the applicant is either economically unable to pay the fee, or that if the applicant does pay the fee, it will place the applicant in a state of financial distress or emergency. As stated by the D.C. Circuit:

> The applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary.[29]

This material must be included with the petition for waiver at the time of filing the application. The Commission, or its designee, will analyze petitions for waiver to determine whether the standards for waiver have been met. The Commission will notify the applicant as to whether the petition for waiver has been denied or accepted.

G. Procedures for Paying Fees

The Commission's NOPR states that fees must be submitted by certified check, made payable to the United States Treasury. A number of commenters argue that there is no reason to require certified checks. They state that a corporate check should be sufficient.

The Commission has decided to delete the certified check requirement. However, a check made payable to the United States Treasury must still be included with the filing or application, unless a petition for waiver is submitted in lieu of the fee. The check must indicate for what the fee is being submitted, *e.g.*, tariff filing, general change in rates. This may be written on the botton of the check. If the filing or application is not accompanied by either the appropriate fee or

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[29] United Gas Pipe Line Company v. FERC, 707 F.2d 1507, 1511 (D.C. Cir. 1983).

a petition for waiver, it will be considered deficient and will not be processed.[30]

A few commenters question the Commission's decision to exclude the possibility of fee refunds. The Commission's decision not to allow refunds is consistent with the policy behind the IOAA. That statute authorizes and orders Government agencies to become self-sustaining to the fullest extent possible. To do so, the agency is to collect fees for services and benefits it provides. The Congress gave this Commission the duty of carrying out the Natural Gas Act, part of which is to review and regulate pipeline rates. These are services for which the IOAA authorizes the collection of fees. The service is reviewing the tariff filing, not guaranteeing the acceptance of the filing or the desired increase in rates. The Commission reviews every tariff filing and rate change equally. Some are accepted, some are not, but the vast majority are accepted. The Commission's fees cover the time and cost of providing these services. It does not cost the Commission any less when it disallows a rate increase or a change in rate schedule or PGA clause. Furthermore, the Commission's decision not to allow refunds is consistent with its current policy of no refunds of fees and annual charges under the NGA under Part 159 of the Commission's regulations.

H. Direct Billing

The methodology used to establish the fees in this rule is based on the actual time of processing filings and the actual agency-wide costs involved with this processing. The Commission takes the actual work-months associated with a class of docketed activity and divides it by the number of completions

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[30] The fees categories established in this final rule are designed on the assumption that jurisdictional entities will continue to submit filings and applications in the same manner as in the past. Although this fee schedule is designed to collect a separate fee for each discrete service or benefit provided, the Commission recognizes that the potential exists, in some cases, for jurisdictional entities to combine filings in order to avoid the assessment of fees. If the implementation of this fee schedule causes jurisdictional entities to alter their reporting practices, the Commission will consider additional means to ensure that the Commission does recover all of the costs it incurs in providing these services.

in that class to arrive at an average number of work-months per completion. That figure is then multiplied by the average cost per work-month to arrive at the fee.

However, the Commission occasionally receives filings which are not average. These filings may be extensive in scope and present factual, legal, or policy issues of such complexity that the Commission may devote an extraordinary amount of time and effort to processing them. In addition, there may not be a truly representative average due to the small number of filings in a particular area.

The standard fees established in this rule bear no reasonable relationship to the actual cost of processing those extraordinary and atypical filings. Moreover, if the costs of processing extraordinary filings are included in the costs associated with average filings, persons submitting average filings would be subsidizing those submitting the extraordinary filings. Therefore, in the case of an extraordinary filing, the Commission reserves the option of ordering a direct billing procedure at the beginning of processing the filing or at any time up to one year after receiving a complete filing. As discussed above, in the case of petitions seeking advance Commission approval of rate treatment of research, development, and demonstration expenditures, the Commission has decided to use direct billing for the entire fee category due to the unavailability of reliable data to establish an average fee.

Under the direct billing procedure, the Commission will periodically bill the entity that submitted the filing for all the direct and indirect costs incurred by the Commission in processing the filing, unless a lesser amount is determined to be fair and equitable. The staff resources devoted to processing a filing resulting in a direct billing will be separately recorded and will not be included in the work-months associated with processing average filings. This final rule also requires the Commission to credit an applicant whose filing becomes subject to direct billing with any fee paid under this fee system.

Four commenters address this issue and each state that the direct billing procedure is entirely too vague. These commenters object to this direct billing method because they claim

that the complexity of a filing might result simply from the participation of intervenors, or because it contains important public policy issues where the potential benefit to the applicant is secondary to that of the public or to other industry members. The Commission recognizes the points made by these commenters but, as indicated above, there is no reason to determine this issue generically in light of the Commission's decision not to establish fees to recover the costs associated with hearings in NGA pipeline rate matters. The possible allocation of some costs to intervenors in direct billing situations will be handled on a case-by-case basis.

IV. FINAL REGULATORY FLEXIBILITY ANALYSIS

When an agency promulgates a final rule under section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553, after being required by that section or any other law to publish a notice of proposed rule making, a final regulatory flexibility analysis may be appropriate under the Regulatory Flexibility Act of 1980. Each final regulatory flexibility analysis must contain (1) a statement of need for the rule, (2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, and the agency response to those comments, and (3) a description of alternatives to the rule consistent with the stated objectives of the applicable statute which the agency considered and ultimately rejected.

In this preamble, the Commission has already detailed its reasons for this agency action, its objectives, and the legal basis for this rulemaking. As discussed, the rule establishes a schedule of fees to be paid to the Commission for certain benefits it provides, in accordance with the IOAA and Budget Circular A-25.

This rule affects natural gas pipelines subject to Commission jurisdiction under the NGA and the NGPA as well as non-jurisdictional entities seeking advance Commission approval of rate treatment of research, development, and demonstration expenditures. There are approximately 150 interstate natural gas pipelines in the United States. The Small Business Administration's (SBA) regulations do not establish specific size standards for natural gas pipelines. (*See* 13 C.F.R. Part 121).

However, natural gas pipelines, especially interstate pipelines, are large businesses. Only about 40 interstate natural gas pipelines possibly could be classified as small entities.[31] Petitioners seeking advance Commission approval of rate treatment of research, development, and demonstration expenditures are pipelines groups of pipelines, or entities owned or controlled by pipelines and, therefore, ususally are either large businesses or are owned and controlled by large businesses. Therefore, this rule may have some degree of economic impact on a number of small pipelines. But, there is no reason to expect that this impact will be significant for a substantial number of those pipelines. Furthermore, the fees established in this final rule are much lower than the fees proposed in the NOPR. This will assuage any potentially significant economic effect.

Concerning the impacts on pipelines, and in particular small pipelines, the final rule addresses those cases where there is either a disproportionate economic burden or severe economic hardship on a pipeline. The rule contains a provision for waiver of fees for an individual applicant which could protect small pipelines from undue economic hardship. However, the Commission is also required to satisfy the IOAA's statutory directive to be "self sustaining to the full extent possible." Hence, there is no blanket exemption for small entities. The Commission believes the rule as now promulgated represents a fair balance between the purposes of both the IOAA and the Regulatory Flexibility Act.

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[31] Generally, the Commission considers small pipelines to be those pipelines classified as Class C or Class D natural gas companies, that is, companies earnings $25,000 or more per year, but less than $1,000,000. (*See* 18 C.F.R. Parts 201, 204, Uniform System of Accounts Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act.) In addition, the Commission considers small entity pipelines to include those companies earning less than $25,000 a year or those that are so new that they cannot yet be classified. The proposed change in nomenclature for these small pipelines in Docket No. RM83-66-000, 48 Fed. Reg. 46361 (October 12, 1983), does not affect in a significant way the conclusions reached herein.

V. PAPERWORK REDUCTION ACT STATEMENT AND EFFECTIVE DATE

This rule does not contain any information collection provisions and therefore is not subject to the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520 (Supp. V 1981). However, this rule is companion to RM 82-25-000, which does contain information collection provisions. Since the information collection provisions in RM82-25-000 are the general procedures for collecting fees and are integral to the administration of this final rule, the effective date for this rule will be the same as that for RM82-25-000. Therefore, this rule will become effective [insert 75 days from date of publication in *Federal Register*]. If OMB's approval and control number have not been received for RM82-25-000 by this effective date, the Commission will issue a notice temporarily suspending the effective date of this final rule.

List of Subjects.

18 C.F.R. Part 154—Natural gas.
18. C.F.R. Part 381—Natural gas, General fees.

In consideration of the foregoing, the Commission is amending Chapter I, Title 18, *Code of Federal Regulations*, as set forth below.

By the Commission.

(S E A L)

KENNETH F. PLUMB,
Secretary.

1. The authority citation for Part 154 is amended to read as follows:

Authority: Natural Gas Act, 15 U.S.C. 717-717z (1976 & Supp. V 1981); Department of Energy Organization Act, 42 U.S.C. §§ 7102-7352 (Supp. V 1981); Executive Order 12,009, 3 C.F.R. 142 (1978); Independent Offices Appropriations Act, 31 U.S.C. 483a (1970).

2. In Part 154, § 154.24 is amended by inserting at the end of the current text, following the word "part", the phrase "or is not accompanied with the fee prescribed in Part 381, unless a petition for waiver is submitted in lieu thereof under § 381.106 of this chapter."

3. In Part 154, § 154.63(b) is amended by adding a new subparagraph (b)(1)(iii) to read as follows:

§ 154.63 **Changes in a tariff, executed service agreement or part thereof.**

* * * * *

(b) * * *

(1) * * *

(iii) A fee in the amount prescribed in Part 381 of this chapter, unless a petition for waiver is submitted in lieu thereof under § 381.106 of this chapter.

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4. The authority citation for Part 375 continues to read as follows:

Authority: Department of Energy Organization Act, 42 U.S.C. 7101-7352 (Supp. V 1981); Executive Order 12,009, 3 C.F.R. 142 (1978); Administrative Procedure Act, 5 U.S.C. § 553 (1976 & Supp. V 1981).

5. In section 375.307, paragraph (u) is revised to read as follows:

§ 375.307 **Delegation to the Director of the Office of Pipeline and Producer Regulation**

* * * * *

(u) Deny or accept, in whole or in part, petitions for waiver of the fees prescribed in §§ 381.201, 381.202, 381.203, 381.204, 381.205, 381.206 of this chapter in accordance with § 381.106(b) of this chapter.

6. The authority citation for Part 381 reads as follows: AUTHORITY: Department of Energy Organization Act 42 U.S.C. §§ 7101-7352 (Supp. V. 1981); Executive Order 12,009, 3 C.F.R. 422 (1978); Independent Offices Appropriations Act, 31 U.S.C. 483a (1970); Natural Gas Act, 15 U.S.C. §§ 717-717z (1976 and Supp. V 1981); Federal Power Act, 16 U.S.C. § 791a-828c (1976 & Supp. V. 1981); Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 (Supp. V 1981); Public Utility Regulatory Policies Act, Pub. L. 95-617, 92 Stat. 3117 (1978): Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1976).

7. In Part 381, Subpart B is amended to read as follows:

SUBPART B—FEES APPLICABLE TO THE NATURAL GAS ACT AND RELATED AUTHORITIES

* * * * *

§ 381.204 **Pipeline tariff filings for general changes in rates and for changes other than in rates.**

The fee established for a tariff filing for general changes in rates and for changes other than rates is $2,000.

§ 381.205 **Pipeline tariff filings that track certain costs.**

The fee established for a tariff filing that tracks costs is $2,300.

§ 381.206 **Petitions for Advance Approval of Rate Treatment of Research, Development, and Demonstration Expenditures**

The fee for a petition seeking advance Commission approval of rate treatment of research, development, and demonstration expenditures will be determined and billed according to the procedures for direct billing set forth under § 381.107 of this chapter.

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SECTION C

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[18 C.F.R. Parts 154 and 381]

Docket Nos. RM83-2-000, RM83-2-001, RM83-2-002, RM83-2-003

FEES APPLICABLE TO NATURAL GAS PIPELINE RATE MATTERS

ORDER NO. 361-A

(Issued April 20, 1984)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order Denying Rehearing.

SUMMARY: On February 6, 1984, the Federal Energy Regulatory Commission (Commission) issued a final rule in Docket No. RM83-2-000, Order No. 361, 49 *Fed. Reg.* 5,083 (Feb. 10, 1984), establishing fees for natural gas pipeline rate matters. The Commission received three timely petitions for rehearing of the final rule in this docket. For the reasons detailed in its order, the Commission denies rehearing of the final rule.

EFFECTIVE DATE: This order will become effective [insert date of publication in the *Federal Register*].

FOR FURTHER INFORMATION CONTACT:

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[18 C.F.R. Parts 154, 381]

Before Commissioners:

Raymond J. O'Connor, Chairman;
Georgiana Sheldon, J. David Hughes,
A. G. Sousa and Oliver G. Richard III.

FEES APPLICABLE TO NATURAL GAS
Pipeline Rate Matters

Docket Nos. RM83-2-000, RM83-2-001, RM83-2-002, RM83-2-003

ORDER NO. 361-A

ORDER DENYING REHEARING

(Issued April 20, 1984)

I. INTRODUCTION

On February 6, 1984, the Federal Energy Regulatory Commission (Commission) issued a final rule establishing fees for pipeline rate matters under the Natural Gas Act (NGA) and related authorities. The Commission received three petitions for rehearing from United Gas Pipe Line (United) (RM83-2-001), Interstate Natural Gas Association of America (INGAA) (RM83-2-002), and Transcontinental Gas Pipe Line Corporation (Transco) (RM83-2-003).[1]

United petitions for a rehearing on one issue: whether the Commission has authority under the IOAA to charge the fees established in its final rule. INGAA petitions on three issues: 1) whether pipelines receive a special benefit that thereby entitles the Commission to charge a fee; 2) whether the direct billing provision is lawful; and 3) whether the cost information

[1] Transcontinental Gas Pipe Line Corp. (Transco) also adopts INGAA's petition.

provided in the final rule is sufficient as a basis for the fees. Transco asserts the same three issues raised by INGAA.

II. DISPOSITION OF PETITIONS FOR REHEARING

A. *Authority Under the IOAA*

In the final rule in this docket, the Commission established fees for the services and benefits it provides to pipelines. The fees were promulgated under the authority of the Independent Offices Appropriation Act (IOAA).[2]

1. *"Services and Things of Value"*

The IOAA states in pertinent part that:

> It is the sense of Congress that each service or thing of value provided by an agency . . . to a person . . . is to be self-sustaining to the extent possible.[3]

Each of the three petitioners contends that there is no benefit to pipelines to substantiate the fees in the final rule. United argues that an earlier Supreme Court case already has addressed FERC's ability to charge fees.[4] Furthermore, it argues that an order of the FPC specifically stated that the Commission would not charge fees because the regulations under the NGA benefit the public.[5]

The Commission believes that it has adequately and thoroughly addressed these arguments in the final rule. Nevertheless, we wish to emphasize several points. First, the earlier positions taken by the former Federal Power Commission

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[2] 31 U.S.C. § 9701 (1982), (amending 31 U.S.C. § 483a (1976 and Supp. V 1981).

[3] 31 U.S.C. § 9701. The language of former § 483(a) was as follows:

> Any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license permit, certificate, registration or similar thing of value . . . performed . . . by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible . . .

[4] FPC v. New England Power Co., 415 U.S. 345 (1974).

[5] *See*, Notice of Proposed Rulemaking to Order No. 317, at 30 Fed. Reg. 12,077 (September 22, 1965).

(FPC) do not bind this successor Commission from taking a different approach to fees.[6] This is, in our opinion, settled law.

Second, the recognition that our regulatory activities were and are beneficial to consumers does not vitiate this Commission's power to charge fees for the services it provides to pipelines. We believe that both pipeline companies and consumers are beneficiaries, but of a different nature and in different degrees. In an ultimate sense, the natural gas market is regulated for the public's (or consumer's) benefit. But that indirect and general benefit is separate from and less immediate than the benefit that accrues directly to pipelines who use Commission services. The D.C. Circuit affirmed this distinction for one of our sister regulatory agencies in *Electronics Industries Ass'n.* v. *FCC*, 554 F.2d 1109, 1115 (D.C. Cir. 1976). In that case, petitioners also argued that fees should not be assessed for tariff filings or equipment testing and approval on the grounds that the public, not the regulated entity, was the only beneficiary.

The court answered that even though both activities (tariff filings and testing) were required by statute, the FCC was entitled to charge for services which assisted a person in complying with his or her statutory duties. Such agency services, the court said, confer an *independent private benefit* since they provide the means for the carrier to obtain its revenues and to regulate subscriber use of its facilities. The court concluded that although the statute was enacted in order to protect the public against excessive or unreasonably discriminating or preferential charges, that result is only an incidental benefit from the service which is actually rendered by the agency, *i.e.*, providing the means for carriers to comply with the statute.

Since we find no relevant distinction between the FCC and the FERC on this point, we believe that the IOAA clearly authorizes us to charge for the direct and indirect costs incurred in performing the services that enable pipeline carriers to operate and obtain their revenues.

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[6] *Id.* at 348.

The Commission also disagrees with the argument put forth by petitioners that the Supreme Court has already decided the issue of whether this Commission may charge fees under the IOAA. The Court in *FPC v. New England Power Co.* explained the issue that was before it:

> "... The Federal Power Commission established filing fees under the Natural Gas Act and under the Federal Power Act. These filing fees have not been challenged. What was challenged were annual assessments under both Acts levied in an effort of the agency to recoup some of the remaining costs under the two Acts ..." [7]

Thus, what the Court was considering was the assessment of annual charges under the NGA and the FPA, not filing fees under the IOAA. The annual charges were struck down because the Commission attempted to charge "whole industries" as opposed to specific individuals or companies which benefitted from Commission services. The individualized approach suggested by the Court in *FPC v. New England Power Co.* is what the Commission has done in this final fees rule.

For the above reasons and those set forth in the final rule, the Commission denies rehearing on this issue.

2. Basis Of Cost Recovery

INGAA and Transco argue that the Commission has failed to provide sufficient information to support the costs that are claimed as the basis for its fees. Furthermore, they claim the fees established are excessive.

The Commission disagrees with these assertions. The final rule sets forth in detail the Commission's fee structure.[8] That discussion explains the direct and indirect costs that make up the fees as well as the Commission's Management Information system (MIS) which tracks Commission workload on the basis of project categories. Furthermore, the final rule provides the formula used for deriving the fees. These calculations are

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[7] 415 U.S. at 346.

[8] 49 Fed. Reg. 5083, 5087, 5088.

detailed further in data sheets which are in the Commission's public rulemaking file.

As for the argument that the fees are excessive, the Commission's fees are a direct result of reported time spent reviewing filed applications and rate schedules. While some filings may seem "simple" to an applicant, they nevertheless require staff analysis and processing. The "average" fee that is established is the next best thing to having a direct billing system for every filing that comes into the Commission. This universal direct billing arrangement is not administratively practical for this Commission at this time. Furthermore, staff believes that most filings take approximately the same amount of time and therefore can be averaged in determining a reasonable fee. Those truly extraordinary filings that depart dramatically from the time and resource requirements for more routine or average filings will be directly billed as explained in the final rule.

Furthermore, the Commission excludes from its calculation those costs that represent benefits to the public. For example, one of the three support cost categories, "inquiries and internal communications", is completely excluded, as are many other budget items which only pertain to special areas of Commission work. Thus, the Commission does recognize that certain costs that it incurs represent public benefits and those costs are excluded.

B. Direct Billing

The Commission's final rule contains a procedure whereby an applicant, whose filing is not average but rather requires an extraordinary amount of Commission time, can be billed directly for all of the direct and indirect costs associated with that filing. (Of course, those costs benefitting the public which the Commission excludes from average fees would also be excluded under direct billing.) INGAA and Transco argue that the direct billing provision is too vague.

These arguments by petitioners were considered in the final rule and we stand by the discussion set forth in that rule.[9] However, the petitioners do raise one new argument with regard to charging intervenors for a portion of a direct billing.

The Commission does not expect to use direct billings frequently in the pipeline rates area (except for the category of research, development and demonstration expenditures). The Commission does, however, state in the rule that sould there be a filing that precipitates a direct billing, the Commission would consider charging, out of fairness to the parties, a portion of that fee to intervenors who receive private benefits. Because the Commission does not expect the issue of charging intervenors to arise frequently, the Commission believes it unnecessary to try to devise a generic formula of apportionment at this time, as requested by the petitioner. We will decide that question, should the need arise, on a case-by-case basis depending on the equities and circumstances involved.

In consideration of the foregoing, the Commission denies rehearing of the final rule in this docket.

By the Commission.

(S E A L)

KENNETH F. PLUMB,
Secretary.

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[9] 49 Fed. Reg. 5,083, 5,090.

SECTION D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[18 C.F.R. Parts 3, 375, 381, 385, and 389]

FEES APPLICABLE TO GENERAL ACTIVITIES

(Docket No. RM82-35-000)

ORDER NO. 395

(Issued August 31, 1984)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations to establish fees for certain general activities of the Commission, including petitions for declaratory orders, requests for interpretation from the Office of the Chief Accountant, review of Department of Energy denials (DOE) of adjustments, review of DOE remedial orders, and search time for Freedom of Information Act requests. This is the third of a series of rules to be issued on fees. These fees are authorized by the Independent Offices Appropriation Act, which provides for the collection of fees to make agencies self-sustaining to the extent possible.

EFFECTIVE DATE: This rule is effective (insert 30 days from the date of publication in the *Federal Register*).

FOR FURTHER INFORMATION CONTACT:

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[18 C.F.R. Parts 3, 375, 381, 385, and 389]

Before Commissioners:

Raymond J. O'Connor, Chairman;
Georgiana Sheldon, A. G. Sousa
and Oliver G. Richard III.

FEES APPLICABLE TO GENERAL ACTIVITIES

Docket No. RM82-35-000

ORDER NO. 395

FINAL RULE

(Issued August 31, 1984)

I. INTRODUCTION

By this rule, the Federal Energy Regulatory Commission amends Part 381 of its regulations to establish fees for the general activities of the Commission. In an earlier rulemaking, the Commission adopted the methodology for establishing fees with respect to services and benefits provided by the Commission as well as the procedures for billing, collecting, waiving, and updating fees.[1] This rule primarily applies this methodology to establish the following fees:

1) $4,900 for a petition for issuance of a declaratory order other than one solely concerned with matters arising under Part I of the Federal Power Act;

2) $100 for a request for interpretation from the Office of Chief Accountant;

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[1] Final Rule, Fees Applicable to Producer Matters under the Natural Gas Act, 49 Fed. Reg. 5074 (Feb. 10, 1984) (Docket No. RM82-25-000). *See also*, Final Rule, Fees Applicable to Natural Gas Pipeline Rate Matters, 49 Fed. Reg. 5083 (Feb. 10, 1984) (Docket No. RM83-2-000).

3) $3,700 for a petition for review of a Department of Energy (DOE) denial of adjustment if the amount in controversy exceeds $30,000; $600 if the amount in controversy is $10,000 up to and including $29,999; and $100 if the amount in controversy is $0 up to and including $9,999; and

5) $5.60 per quarter hour for professional employees, and $2.40 per quarter hour for clerical employees for search time performed while responding to Freedom of Information Act requests.

II. BACKGROUND

The Commission is authorized under the Independent Offices Appropriation Act of 1952 (IOAA) to establish fees for services and benefits it provides.[2] The principal interpretation of the IOAA is Bureau of the Budget Circular A-25[3], which states that a fee should be assessed for each measurable unit or amount of Government service or property from which an identifiable recipient derives a special benefit.

In accordance with the IOAA and authoritative interpretations of that statute,[4] the Commission, in establishing any fee, must:

(a) identify the service for which the fee is being assessed;

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[2] Act of Aug. 31, 1951, Ch. 376, Title V, § 501, 65 Stat. 290, *as codified*, 31 U.S.C. § 9701 (1982).

[3] Bureau of the Budget Circular A-25 (Sept. 23, 1959). This interpretation has been cited by the United States Supreme Court as "the proper construction of the Act." FPC v. New England Power Co., 415 U.S. 345, 351 (1974).

[4] *See* National Cable Television Association, Inc. v. United States, 415 U.S. 336 (1974); FPC v. New England Power Co., 415 U.S. 345 (1974); Mississippi Power & Light Co. v. NRC, 601 F.2d 223 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); National Cable Television Association, Inc. v. FCC, 554 F.2d 1094 (D.C. Cir. 1976); Electronic Industries Association v. FCC, 554 F.2d 1109 (D.C. Cir. 1976); National Association of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976); Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135 (D.C. Cir. 1976).

(b) explain why that particular service benefits an identifiable recipient more than it benefits the general public;

(c) base the fee on as small a category of service as practical;

(d) demonstrate what direct and indirect costs are incurred by the Commission in rendering the service, and show that those costs are incurred in connection with the service rendered to the beneficiary; and

(e) set a fair and equitable fee for the service.

For the reasons detailed below, the Commission believes that the fees set forth in this final rule for general activities of the Commission meet these requirements.

III. SUMMARY AND ANALYSIS OF COMMENTS

This rule establishes fees for four general activities of the Commission; reviewing petitions for issuance of declaratory orders, reviewing requests for interpretations by the Office of Chief Accountant, reviewing DOE denials of adjustments, and reviewing DOE remedial orders.

Under Rule 207 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.207 (1983), a person may file a petition for issuance of a declaratory order to terminate a controversy or remove uncertainty concerning matters under the Natural Gas Policy Act of 1978; the Public Utility Regulatory Policies Act of 1978; the functions delegated to the Commission by the Department of Energy Organization Act and the Secretary of Energy; and the Commission's regulations. For these types of declaratory orders a filing fee of $4,900 has been set. However, the Commission has excluded declaratory orders that solely concern hydroelectric matters under Part I of the Federal Power Act (FPA) because these costs are included in calculating annual charges under section 10(e) of the FPA, 16 U.S.C. § 803(e) (1982). (See Section III.F.3 below).

A person can also request an interpretation by the Office of Chief Accountant in accordance with § 3.8 of the Commission's regulations, 18 C.F.R. § 3.8 (1983). An interpretation states a

staff opinion of the proper application of the Commission's reporting and record rentention requirements and Uniform Systems of Accounts in light of the particular facts or circumstances raised by the applicant. This fee is $100.

The Commission reviews a Department of Energy (DOE) denial of adjustment under Subpart J of its regulations, 18 C.F.R. Subpart J (1983). Review provides appellants with another opportunity to seek relief from DOE rules and orders. Appellants initiate review and must, by statute, do so before seeking judicial review. Similarly, the Commission reviews DOE remedial orders under Subpart I of its regulations, 18 C.F.R. Subpart I (1983). Review may result in the Commission's revocation or modification of a DOE remedial order. As with DOE denials of adjustments, appellants initiate review and must do so before seeking judicial review. The fees for these two types of reviews range from $100 to $3,700 depending on the amount in controversy.

The Commission is adopting in this rule a procedure to update fees for Freedom of Information Act (FOIA) requests. This rule also applies that procedure to update FOIA fees and establish fees of $5.60 per quarter hour of search time performed by a professional employee and $2.40 per quarter hour for search time performed by a clerical employee. The fees for duplication will remain the same.

The Commission has decided not to establish a fee for filing a petition for rehearing at this time. In those cases where an applicant's petition for rehearing seeks a private benefit, the Commission believes it could charge a fee for reviewing that petition. However, there are also cases where a petition for rehearing raises matters that, on balance, address more general public interest issues. In those cases, the Commission does not believe it would be reasonable to impose a fee. Because of the large administrative burden involved in trying to segregate which rehearing petitions could be subject to a fee, the Commission has decided not to set a fee for a petition for rehearing at this time.

One commenter states that the Commission should not charge a fee for rulemakings. The Commission is not charging a fee for rulemakings in this rule. The Commission is also not

charging a fee for a number of other actions it takes relating to its jurisdictional statutes. Those actions include Commission preliminary and formal enforcement investigations, Commission enforcement-related settlements and litigation, news releases, and litigation in the courts. As for these activities, the Commission believes that these actions generally do not manifest the necessary, identifiable benefit to an individual entity. As for rulemakings, while the Commission believes that these actions might warrant fees, the Commission has decided not to establish a separate fee category for these items at this time.[5]

B. Special Benefits to Identifiable Recipients

In delineating the services or benefits for which agencies are permitted to charge under the terms of the IOAA, Budget Circular A-25 states that a fee may be charged to an identifiable recipient who derives a special benefit from a Government service.[6] In addition, the Circular states that a "special benefit" has accrued if the recipient obtains "more immediate or substantial gains or values . . . those those which accrue to the general public."[7]

A number of commenters state that to be classified as an allowable "fee" under the IOAA, a particular charge must be incident to a voluntary act. Seeking guidance on the proper application of jurisdictional statutes or Commission regulations, they say, are not voluntary acts but are required because violations of Commission statutes and regulations may carry heavy penalties. Likewise, review of DOE actions, they say, are not voluntary acts, but are required by the Department of Energy Organization Act before initiating judicial review. This type of argument has previously been rejected in *National Cable Television Association, Inc. v. FCC,* 554 F.2d 1094 (D.C. Cir. 1976); *Mississippi Power & Light Co. v. NRC,* 601 F.2d 223 (5th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980); and *Electronic Industries Association v. FCC,* 554 F.2d 1109 (D.C. Cir. 1976).

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[5] The Commission is considering, in other rulemakings, fees to recover the costs of certain rulemakings. In those cases, the Commission believes that there are special benefits provided to identifiable recipients.

[6] Budget Circular A-25, at 1-2.

[7] *Id.* at 2.

In response to the argument put forth by cable television operators that they receive no benefit from an FCC license because the cable television industry would have developed better without FCC regulation, the D.C. Circuit in *National Cable Television* said "[a]ll that may be true, but these distinctions have no relevance here. The fact is that the FCC has undertaken to regulate this industry and has so far been sustained by the Supreme Court in this endeavor, with the result that a certificate of compliance *has* become a necessary and therefore valuable license."[8] The Fifth Circuit in *Mississippi Power & Light* similarly held that since a license from the NRC is an absolute prerequisite to operating a nuclear facility, that license is a benefit not shared by other members of society.[9] In addition, the D.C. Circuit held in *Electronic Industries Association* that agencies can charge for services which assist a person in complying with his statutory duties because these services create an independent private benefit.[10] Hence, the Commission believes this issue has been settled by the courts and need not be the subject of further discussion in this rule.

Many commenters argue that the proposed rule fails to explain how requesters of these services receive a greater benefit from the Commission's regulations than the general public. They claim that the Commission's regulations offer no greater benefit than the authorization to carry out activities in interstate commerce in conformity with a regulatory scheme which benefits only the general public. Other commenters raise related arguments: that Commission regulation is not a benefit but a detriment to those regulated; that the courts have held that the Commission's activities are primarily for the benefit of the general public; and that the Commission itself has recognized that its functions primarily benefit the general public.

While consumers may be ultimate beneficiaries from Commission regulation, that is not determinative of the Commission's right to charge fees under the IOAA. The IOAA provides for the collection of fees for each service or thing of value

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[8] 554 F.2d at 1101-02 (footnotes omitted, emphasis in original).

[9] 601 F.2d at 229.

[10] 554 F.2d at 1115.

provided by the agency.[11] Commission review of DOE actions and interpretations of its enabling statutes and regulations are the types of services for which the IOAA expressly authorizes the collection of fees. Not only is the statute clear on its face, but the D.C. Circuit has held that a fee otherwise authorized by the IOAA is not rendered invalid because the public may also enjoy downstream benefits.[12] In addition, the fact that the Federal Power Commission (FPC) took an opposite approach toward fees in 1965 does not prevent this successor Commission from adopting a different policy. Not until the 1970's did the courts begin reviewing fee structures of various agencies. It was after those cases were decided that the law became clear, and the Commission now believes that it can charge the fees established by this rule.

Commenters also assert that the imposition of a substantial fee to review DOE remedial orders and denials of adjustments are barred by due process considerations because the fee may have a chilling effect on the exercise of the right to judicial review due to economic hardship or indigency. The Commission disagrees with these assertions because we believe that the reduced fees and the case-by-case waiver procedures will prevent economic hardships and adequately protect the rights of indigents.

C. Smallest Practical Unit

In designing a fee schedule, the Commission has established fees on the smallest unit or category of service that is practical. In remanding fees established by the FCC, the

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[11] 31 U.S.C. § 9701 (1982).

[12] Electronic Industries Association v. FCC, 554 F.2d 1109, 1115 (D.C. Cir. 1976). In that case, petitioners argued that fees should not be assessed for tariff filings or equipment testing and approval. The court answered that even though both activities were required by statute, the FCC was entitled to charge for services which assisted a person in complying with his statutory duties. Such services, the court said, create an independent private benefit since they provide a means for the carrier to obtain its revenues and to regulate subscriber use of its facilities. The court concluded that although the statute was enacted in order to protect the public against excessive or unreasonably discriminatory or preferential charges, that result is only an incidental benefit from the service which is rendered by the agency, *i.e.*, providing the means for carriers to comply with the statute.

United States Court of Appeals for the D.C. Circuit set forth the most authoritative interpretation of this IOAA requirement as follows:

> [W]e interpret the statute and the Supreme Court decisions to require reasonable particularization of the basis for the fees, accomplished by an allocation of costs to the smallest unit that is practical. In most cases, we expect this unit will be classes of carriers or applicants or grantees or services which the Commission has already singled out for separate treatment in its 1975 fee schedule. Classification is always a difficult problem, involving as it does the drawing of lines; but the solution is not to group dissimilar entities together. The Commission must examine its expenses and set forth the maximum particularization of costs which it conveniently can make, so that the correctness of its actions can be reviewed.[13]

Further, Budget Circular A-25 states that "[c]osts shall be determined or estimated from the best available records in the agency, and new cost accounting systems will not be established solely for this purpose."[14]

Commenters argue that fees for declaratory orders should be determined based on subject area because the time spent on requests in one area of the Commission's jurisdiction may differ from the time spent on another area. The Commission understands these concerns, but one fee for declaratory orders is necessary because of administrative limitations. Specifically, the Commission, in keeping with Budget Circular A-25, classifies its fees by types of applications or proceedings (*i.e.* declaratory orders). The Commission has calculated its fees from its Management Information System (MIS). The MIS is an agency system established to track workload. The MIS tracks time by work-months based on types of applications or proceedings. The Commission is establishing one fee for an

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[13] Electronic Industries Association v. FCC, 554 F.2d 1109, 1116 (D.C. Cir. 1976).

[14] Budget Circular A-25, at 3.

entire application or proceeding because that application or proceeding is the smallest unit practical for which the Commission can develop fees.[15]

D. Basis of Cost Recovery

1. Direct and Indirect Costs Included

The Commission's fee schedule is designed to account for all types of recoverable costs associated with the processing of the specified applications and filings under the Commission's jurisdictional statues. The costs attributable to a particular Commission service are not merely the salaries of the employees who review the applications or filings. The attributable costs include these direct salary costs as well as the substantial amount of indirect costs which the Commission expends in its reviews. As the Fifth Circuit has stated, employees

> . . . must be supplied [with] working space, heating, lighting, telephone service and secretarial support. Arrangements must be made so that . . . [they are] hired, paid on a regular basis and provided specialized training courses. These and other costs such as depreciation and interest on plant and capital equipment are all necessarily incurred in the process of reviewing an application.[16]

Accordingly, the Commission has included in its fee calculations a proportionate share of the following items: salaries and benefits; travel; rents; communications and utilities; printing; other support services; supplies; and equipment.

2. Methodology

(a) Underlying Considerations

The Commission's calculation of the costs of providing each of the services represented by a fee category is directly

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[15] The Commission has recently updated the MIS by starting to track its workload on a new system (Time Distribution Reporting System) which may provide an even greater degree of accuracy of Commission workload. At this time, however, the Commission does not have sufficient date to develop actual fees from this system.

[16] Mississippi Power & Light Co. v. NRC, 601 F.2d at 232.

related to the amount of time the Commission spends providing each of the services. The fees in this rule are based on information obtained through the Commission's Management Information System (MIS), which provides the amount of time spent on all Commission functions. The functions are grouped into categories which represent the Commission's various programs, including gas wellhead pricing, gas pipeline rates, gas pipeline certificates, gas producer certificates, gas producer rates, oil pipeline regulation, hydropower regulation, and electric power regulation. The MIS workload data are recorded on a monthly basis.

With respect to each function, the supervisor records for the MIS the number of projects initiated (receipts) and completed (completions) in a particular time period. Most Commission functions can be measured in terms of the number of projects initiated and completed. In accordance with Commission practice, these projects are generally assigned docket numbers and, for purposes of this discussion, will be referred to as "docketed activities." The supervisor in each organizational unit reports to the MIS the amount of time spent by staff on each functional category in terms of work-months. A "work-month" is the unit of work represented by one employee's devotion of 100% of his or her time for one month. In addition, time sheets are coded by functional categories and are filled out Commission-wide every two weeks. Supervisors check employee time sheets for accuracy in coding.

Support functions regularly undertaken, with respect to any program, are not docketed and may not be measured in terms of receipts and completions. The nature of these functions makes impractical any measurements in terms of receipts and completions, but these functions are nevertheless essential to the completion of any docketed activity. This time is also allotted and reported by unit supervisors in terms of work-months.

Only those support functions that are related to providing a benefit are included in the calculations. These support functions will be referred to as "support activities" and can be divided into three categories. First, there are support activities that involve general supervision, personnel management, and

routine administrative functions such as maintenance of time and leave records, the handling of property and supplies, staff meetings, and the planning and organizing of leave. This category can be labeled as "administrative services" and is included in the fee structure because it is essential to the Commission's ability to complete docketed activities.

Second, support staff responds to requests for information that may not contribute directly to the completion of a docketed activity. Examples include requests for information from the public, from the Congress, from the General Accounting Office, and from other governmental agencies. The Commission has excluded from its calculation of fees the work-months associated with this second category of "inquiries and internal communications" because this type of support activity is not involved in completing docketed activities.

Third, support staff establishes or reviews certain Commission operations and procedures. This is "technical management and operations." These activities include work on the Commission budget, management information systems, and program development functions such as special studies or briefings on relevant subjects, but which are not identified with just one docketed activity. This category is therefore an integral part of completing docketed activities.

The comments indicate confusion as to the difference between indirect costs and support functions. While both are types of indirect costs, they are channeled into the cost calculation at different times. Direct and indirect costs (such as physical plant overhead) are added together to come up with an average monthly cost per Commission employee of $4,770.67. That figure is multiplied by the time (in work-months) taken to review a type of application. Support activities represent work-months expended which cannot be allocated directly to each individually-tracked, docketed activity. Therefore, the work-months used in the fee calculation consist both of time actually spent reviewing a particular type of application and also a pro-rata share of the time spent on support activities associated with reviewing that type of application.

(b) Calculation of Fee Amounts

For purposes of this rule, this Commission has used the same methodology to determine the cost of providing any service or benefit as it has used in the other final fees rules. First, the work-months reported for a class of docketed activity are added to a pro-rata share of the work-months reported for the relevant support activities for that activity. This figure, representing the total number of work-months dedicated to a class of docketed activity for a year, is divided by the number of completions for that year for the given activity. The resulting quotient represents the average number of work-months required to complete one proceeding in that given class of docketed activity.

Second, the Commission used the following data provided by its Office of Program Management to figure the average cost of a work-month, based on the Commission's FY 1983 actual costs.

Salaries and Benefits	
Based on year and payroll data and benefits @ 26%	$46,228
Travel	726
Transportation of Things	7
Rents, Communications & Utilities	3,185
Printing	1,899
Other Services—excludes direct program contracts.	4,684
Supplies	477
Equipment	42
Total	$57,248

The total was divided by 12 to yield an average work-month cost of $4,770.67.

Third, in order to determine the cost of an activity, the Commission multiplied the average work-month cost by the average number of work-months required to complete the activity.[17]

[17] Updated data sheets have been placed in the Commission's Public File Room detailing the calculations.

There were numerous complaints about the cost methodology proposed in the Notice of Proposed Rulemaking (NOPR), 47 Fed. Reg. 27,375 (June 24, 1982), such as inadequate information to verify the costs, calculations based on salary and overhead from one year and time per project from another year, use of budgeted figures as opposed to actual figures, use of average work-month costs rather than median or mode, and use of only one year for determining fees.

As for what costs are permissible for inclusion, the IOAA provides for the collection of fees which include both direct and indirect costs to the Government. Thus, there is no reason to exclude any item except for support functions relating to inquiries and internal communications, as discussed above. Second, in devising its fee schedule, the Commission is authorized to determine or estimate its costs "from the best available records in the agency."[18] For this Commission, that means the MIS.

The NOPR proposed to use 1982 budgeted figures to determine its costs, and 1981 actual completions and work-months to determine the fees. In addition, the method of updating the fees was tied to 1981 as the "base year." Each subsequent year was to be adjusted by the change in costs between the base year and the year in consideration. Many commenters argue that 1981 may not be a typical year for completions and work-months, and thus, should not be the base year. The Commission agrees with this argument, and believes it is more accurate to calculate fees from actual completions and work-months, as well as actual costs. Consistent with its decision in the other final fees rule, the Commission is using actual fiscal year figures in this rule as well as in updating the fees in subsequent years (see section III E. below). The fees in this rule are based upon actual fiscal year 1983 direct and indirect costs, completions, and work-months. This approach eliminates any inaccuracies which could arise from using budgeted figures and will keep data current.

One commenter claims that the Commission gives no consideration to the number of staff personnel actually involved in a specific activity, but rather the commenter says the

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[18] Budget Circular A-25, at 3.

Commission assumes it will operate with a full staff. The Commission's MIS calculates work-months for every office at the end of each month, based on the number of full time employees actually working at the time of calculation. Thus, no assumptions are made regarding staffing levels.

Finally, a number of commenters claim that the Commission should not use an agency-wide figure for determining its direct costs. Instead, they maintain that the Commission should determine fees based on the salary of only those employees processing particular filings. As permitted under the requirements of Budget Circular A-25, the Commission's accounting system employs an agency-wide figure so the Commission is entitled to use an agency-wide figure as the basis for its costs.

E. Actual Fees Established and Procedure for Updating Fees

The following table summarizes for 1983 the total number of work-months, completions, and average cost per completion in rendering the services for which the Commission is establishing fees in this final rule. (FOIA search fees are subject to a different methodology, as discussed below).

Service	Total WM's in 1983	Total completions in 1983	Average number WM's per completion in 1983	Average cost per completion in 1983
Interpretations by Office of Chief Accountant	26.02	653	.04	$ 190.82
Petitions for issuance of declaratory orders (except under Part I of FPA)	129.87	50	2.59	$12,356.03
Review of DOE denials of adjustments	39.76	20	1.98	$ 9,445.92
Review of DOE remedial orders	36.1	23	1.57	$ 7,489.95

The Commission believes that the average cost per completion for petitions for issuance of declaratory orders, review of DOE denials of adjustments, and review of DOE remedial

orders is such that to recover these costs fully would substantially discourage the use of these services. In addition, these services may be requested by a broad spectrum of regulated entities, and there are a substantial number of small businesses and other organizations within this class. In keeping with its obligation to consider inequitable burdens on small entities and as a matter of administrative fairness, the Commission believes that a categorical reduction for each of these three categories of general activities is in the best interest of the public and of the Commission. The categorical reductions are policy judgments by the Commission representing its best estimate of the magnitude of reduction that may be necessary to avoid discouraging the use of these services. It is possible that higher percentages could be necessary, but more experience under this fee structure is needed before that judgment can be made. Accordingly, the fees for each of these services have been reduced by approximately sixty percent. The issue of categorical fee reductions is discussed generally in section III. F.1 below.

In addition, the Commission is particularly concerned with the inequitable burden on small entities from seeking review of DOE denials of adjustments and DOE remedial orders. Consequently, these two fees have been categorically reduced further when the amounts in controversy are below $30,000. Specifically, if the amount in controversy is $10,000-$29,999 then the fee is $600. Similarly, if the amount in controversy is less than $10,000, then the fee is $100. The commission believes these additional fee reductions will prevent inequities and undue burdens on small entities that, by their size, generally have lesser amounts in controversy.

The following fees are therefore established:[19]

Services	Fee
Interpretations by Office of Chief Accountant	$ 100
Petitions for issuance of declaratory orders (except under Part I of the FPA)	$4,900
Review of DOE denials of adjustments	
Amount in controversy:	
$0-$9,999	$ 100
$10,000-$29,999	$ 600
$30,000 or above	$3,700
Review of DOE remedial orders	
Amount in controversy:	
$0-$9,999	$ 100
$10,000-$29,999	$ 600
$30,000 or above	$2,900

The Commission will update its fee's under Part 381 each year to reflect the most current Commission costs. An updated fee schedule will be published annually in the *Federal Register* after the close of the preceding fiscal year. The updated fees will be based on actual completions, work-months, and costs from the preceding fiscal year. In this way, the fees will reflect, using the most current data available, the benefits to the recipients.

The NOPR also stated that the Commission's fees under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), would also be updated annually based on these procedures. However, only the direct cost for search and duplication of documents may be recovered under FOIA.[20] Specifically, the fees for FOIA requests under the Commission's regulations, 18 C.F.R. § 3.8(k) (1983), are based on the

[19] Fees are established by taking actual costs and rounding down to:

(1) the nearest $5 increment, if the total cost is $100 or less; and

(2) the nearest $100 increment, if the total cost is more than $100.

[20] 5 U.S.C. § 552(a)(4)(A) (1982). *See* Final Rule, Fees Relating to Freedom of Information Act Requests, 47 Fed. Reg. 23,148 (May 27, 1982); 47 Fed. Reg. 24,961 (June 8, 1982) (Docket No. RM81-40-000).

average cost for professional employees (GS-10 or above) and clerical employees (GS-9 or below) and the average cost of duplication. So, the Commission will update FOIA fees each year based on the average cost per quarter hour of professional employees, and clerical employees, and the average cost of agency record duplication for the previous fiscal year, as required by the FOIA. The Executive Director will publish the updated fees in the *Federal Register*.

Based on this methodology, this rule updates the FOIA fees based on fiscal year 1983 costs. Those fees are set at 1) $5.60 per quarter hour for search services performed by a professional employee; and 2) $2.40 per quarter hour for search services performed by a clerical employee. The fees for duplication are unchanged.

F. Exceptions to Full Cost Recovery

1. Reductions in Fee Amounts by Category

The Commission has established in this rule a certain fee which includes all the recoverable costs associated with the particular benefits and services provided, and has categorically reduced other fees. The Commission, based on its expertise, recognizes that there may continue to be instances in which establishing full cost recovery fees would have an adverse effect on applicants, or would undermine Commission activities. In such cases, the Commission may again exercise its discretion to reduce fees to less than full cost recovery in order to prevent a disproportionate economic impact or for other good cause. Good cause would include situations where the Commission wishes to encourage use of a service, where less Commission time is required than staff time, or where there is a reduction in the amount of time required to process a filing. Any new reduction in a fee would be initiated only by the Commission by rulemaking. The same percentage of reduction will carry over to subsequent years for any categorical reduction unless further notice is given that the Commission is altering that reduction.

Commenters argue that the Commission needs more specific guidelines in this area, particularly to include undue economic hardship as a standard. The Commission believes that the standards enumerated are sufficiently specific, particu-

larly since any categorical reductions in fee amounts is done in the context of a rulemaking. Moreover, any determination on whether to establish a fee at less than full cost recovery amount takes into account economic hardship, as discussed above, if it applies to a class of applicants. This is to be distinquished from the situation where an individual applicant can demonstrate severe economic hardship and qualify for a waiver, as discussed below.

2. Case-by-Case Waiver Procedure

The Commission also realizes that a different situation could arise in which a person is unable to pay fees as set by the Commission due to severe economic hardship. If a person is suffering from a period of severe economic hardship, he will have the burden of presenting evidence to the Commission, such as a financial statement, showing that he is either economically unable to pay the fee or that, if he does pay the fee, it will place him in a state of financial distress or emergency. As stated by the D.C. Circuit:

> The applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary.[21]

This material must be included with the petition for waiver at the time of filing. The Commission, or its designee, will analyze petitions for waiver to determine whether the standards for waiver have been met. The Commission will notify the petitioner as to whether the petition for waiver has been denied or accepted.

3. Exempt Classes

One commenter asserts that States and municipalities are exempt from fees collected under IOAA. The Commission agrees when a State or municipality uses a Commission service to serve the general public[22], but this may not be the case every time the Commission acts upon a filing from a State or

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[21] United Gas Pipe Line Company v. FERC, 707 F.2d 1507, 1511 (D.C. Cir. 1983).

[22] Beaver, Bountiful, Enterprise v. Andrus, 637 F.2d 749 (10th Cir. 1980).

municipality. However, because of the large administrative burden involved in trying to segregate which services and benefits rendered to States and municipalities could be subject to fees, the Commission has decided to exempt States and municipalities from fees collected under the IOAA. The IOAA also exempts any person engaged in the transaction of official business of the Federal government. So, the Commission has provided an exemption for this situation as well.

The Commission is permitted under section 10(e) of the FPA to assess licensees an annual charge for the purpose of reimbursing the United States for the cost of administering Part I of the FPA. Consequently, the Commission has decided to make petitions for the issuance of declaratory orders that solely concern matters under Part I of the FPA exempt from the fee normally charged for declaratory orders because these costs will be used to determine the annual charges assessed to licensees. A petitioner should file a petition for exemption that summarizes the issues raised in its petition for issuance of a declaratory order and explains why the exemption is applicable. If the petition is denied, the petitioner will have 30 days from the date of notification of the denial to submit the appropriate fee to the Commission. The Commission will not use the time spent processing petitions for which a fee has been paid to calculate annual charges.

G. Procedures for Paying Fees

The Commission's notice states that fees must be submitted by certified check, made payable to the United States Treasury. A number of commenters argue that there is no reason to require certified checks. They state that a corporate check should be sufficient.

The Commission has decided to delete the certified check requirement. However, a check made payable to the United States Treasury must still be included with the filing or application unless a petition for waiver or exemption is submitted in lieu of the fee. The check must indicate for what the fee is being submitted, *e.g.*, review of a Department of Energy remedial order. This may be written on the bottom of the check. If the filing or application is not accompanied by either

the appropriate fee or a petition for waiver or exemption, it will be considered deficient and will not be processed.

Commenters complain of the Commission's decision to exclude the possibility of fee refunds. They argue that the Commission should include a provision in the final rule whereby a person could receive a refund if his filing was rejected on grounds other than nonpayment of fees, or if the Commission did not respond within a reasonable amount of time. One commenter also argues that the Commission must provide for refunds so that Commission business can continue while the proposed fees are undergoing judicial review.

The Commission's decision not to allow refunds is consistent with the policy behind the IOAA. That statute authorizes and orders Government agencies to become self-sustaining to the extent possible. To do so, the agency is to collect fees for services and benefits it provides. The Congress gave this Commission the duty of carrying out functions under a number of statutes. These functions are the basis of the services for which the IOAA authorizes the collection of fees. These services are performed by reviewing the petition, application or answer, not guaranteeing the issuance of a declaratory order, interpretation, or order. The Commission reviews every petition, request, or answer. Some petitions and requests are accepted, some are not, but the vast majority are accepted. The Commission's fees cover the time and cost of providing these services. It does not cost the Commission any less when it rejects a petition or request or upholds an action by DOE.

In addition, the Commission's decision not to allow refunds is consistent with its current policy of no refunds of fees charged for services in other areas of Commission activity and of annual charges under the FPA.

H. Direct Billing

The methodology used to establish the fees in this rule is based on the actual time of processing filings and the actual agency-wide costs involved with this processing. The Commission takes the actual work-months associated with a class of docketed activity and divides it by the number of completions

in that class to arrive at an average number of work-months per completion. That figure is then multiplied by the average cost per work-month to arrive at the fee.

However, the Commission occasionally receives filings which are not average. These filings may be extensive in scope and present factual, legal, or policy issues of such complexity that the Commission may devote an extraordinary amount of time and effort to processing them. The standard fees established in this rule bear no reasonable relationship to the actual cost of processing those extraordinary filings. Moreover, if the costs of processing extraordinary filings are included in the costs associated with average filings, persons submitting average filings would be subsidizing those submitting the extraordinary filings. So, in the case of an extraordinary filing, the Commission reserves the option of ordering a direct billing procedure when the processing of the filing begins, or at any time up to one year after receiving a complete filing.

Under the direct billing procedure, the Commission will periodically bill the entity that submitted the filing for all the direct and indirect costs incurred by the Commission in processing the filing, unless a lesser amount is determined to be fair and equitable. If the decision to bill a lesser amount is based upon the presence of intervenors in a proceeding, the Commission is retaining the discretion to determine whether some of the costs not directly billed to an applicant should instead be billed to the intervenors. The Commission doubts this will occur frequently since intervention usually does not occur in the general activities covered by this final rule or, if it does, the intervenors are raising issues oriented toward protecting the public interest as opposed to a private interest. Any decision to directly bill intervenors will be made on a case-by-case basis.

Commenters state that the direct billing procedure is entirely too vague. These commenters object to this direct billing method because they claim that the complexity of a filing might result simply from the participation of intervenors, that it is impossible to know beforehand if a matter will be complex, and that a proceeding may be complex because it contains important public policy issues where the potential benefit to the applicant is secondary to that of the public or to

other industry members. A suggestion has been made that if the Commission does require direct billings in complex cases, it should allocate the fees among the intervenors as well as the applicant since the intervenors receive the same benefit as the original applicant. The Commission recognizes the points made by these commenters. Consequently, the possible allocation of some costs to intervenors in direct billing situations will be handled on a case-by-case basis.

Also, a commenter requests that the Commission itemize all direct billings so that there will be a means of appealing the billed amount. Finally, one commenter suggests that, in the case of unsuccessful staff contests of filings, there be no additional direct billing costs. Where there is a direct billing, the Commission will itemize, to the best degree of accuracy under the MIS, the costs involved in the direct billing. There is no way the Commission can estimate in advance what the costs will be, but once the party is advised that direct billing will be used, it can then decide whether or not to pursue the matter. In addition, the staff resources devoted to processing a filing resulting in a direct billing will be separately recorded and will not be included in the work-months associated with processing average filings. Moreover, the Commission will credit a person whose filing becomes subject to direct billing with any fee paid under this fee system.

IV. SUMMARY OF FINAL RULE

This final rule establishes fees for services and benefits provided by the Commission in new Part 381 of Chapter 1, Title 18 of the *Code of Federal Regulations.*

Section 3.8 is amended to update search fees to $5.60 per quarter hour for professional employees and $2.40 per quarter hour for clerical employees. The fees for duplication are unchanged.

Section 381.301 establishes a $100.00 fee payable upon the submission of a written request for an interpretation by the Office of Chief Accountant.

Section 381.302 establishes a $4,900 fee payable upon submission of a petition for a declaratory order.

Section 381.303 establishes fees ranging from $100 to $2,900 based on the amount in controversy. These fees are payable upon filing of an answer in a proceeding to review DOE remedial orders.[23]

Section 381.304 establishes fees ranging from $100 to $3,700 based on the amount in controversy. These fees are payable upon the filing of a petition for review of a DOE denial of an adjustment request.

In addition, this rule makes a number of technical, conforming amendments to the Commission's regulations. These conforming amendments: (1) provide the appropriate delegations to Commission staff to implement the procedures for waiving fees, updating fees, and exempting persons; (2) address the above-mentioned categories of service; and (3) ensure that the requirement that the proper fees are filed with each request, petition, or appeal (except FOIA requests) is clearly stated in the appropriate sections of Parts 3 and 385. In addition, section 3.8(k) requires the publication of an updated fee schedule each year for Freedom of Information Act requests to reflect the most current Commission costs.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

When an agency promulgates a final rule under the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982), after being required by that section or any other law to publish a notice of proposed rulemaking, a final regulatory flexibility analysis may be appropriate under the Regulatory Flexibility Act of 1980. Each final regulatory flexibility analysis must contain (1) a statement of need for and objective of the rule, (2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, and the agency response to those comments, and (3) a description of significant alternatives to the rule consistent with the stated objectives of the applicable statute which the agency considered and ultimately rejected.

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[23] The fee accompanies an answer because the proceeding may be initiated by a filing with the Secretary of Energy. *See* 18 C.F.R. § 385.904 (1983).

In this preamble, the Commission has already detailed its reasons for this agency action, its objectives, and the legal basis for this rulemaking. As discussed, the rule establishes a schedule of fees to be paid to the Commission for certain benefits it provides, in accordance with the IOAA and Budget Circular A-25.

During the past year, approximately 54 petitions for declaratory orders, 653 requests for interpretations of the Uniform Systems of Accounts, 17 requests for review of DOE remedial orders, and 13 requests for review of DOE denials of adjustments were filed with (as distinct from completed by) the Commission. These requests, petitions, and answers have been submitted by all types of entities, some of which are regulated by the Commission and some of which are not.

The Small Business Administration's (SBA) regulations do not establish specific size standards for each of the entities regulated by the Commission that would be subject to this rule.[24] Most natural gas and oil pipelines and electric utilities are large businesses, yet a portion of this group would probably be considered small. A greater number of natural gas producers and hydroelectric facility licensees, however, might be classified as small businesses. In addition, within the class of individuals and entities not regulated by the Commission but which could be expected to seek the services covered by this proposal, there may be many small businesses. For instance, this proposal will also affect those individuals and entities which seek Commission review of DOE denials of adjustments and DOE remedial orders. These entities include retailers, resellers, refiners, and oil producers and within these various classes of entities, the Commission believes there may be some small businesses. Therefore, the Commission believes this rule may have an adverse impact on a certain, but not necessarily substantial, number of small entities, primarily natural gas

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[24] 5 U.S.C. § 601(3) *citing to* section 3 of the Small Business Act, 15 U.S.C. § 632 (1982). Section 3 of the Small Business Act defines "small-business concern" as a business which is independently owned and operated and which is not dominant in its field of operation. *See also* SBA's revised Small Business Size Standards, 49 Fed. Reg. 5024 (Feb. 9, 1984) (to be codified at 13 C.F.R. Part 121).

producers, hydroelectric licensees, and permittees, retailers, resellers, and oil and gas refiners.

Where a rule will have a significant economic impact on a substantial number of small entities, section 604(a)(3) of the RFA requires the Commission to discuss significant alternatives to the proposal. The Commission has already fully detailed its attempt to minimize any disproportionate burden the proposal would have on a small entity. For example, the fees for petitions for issuance of a declaratory order, review of DOE denials of adjustments, and review of DOE remedial orders have been categorically reduced by approximately sixty percent to avoid discouraging use of these services, particularly by smaller entities. In addition, the fees for review of DOE denials of adjustments and DOE remedial orders have been further reduced when the amount in controversy is below $30,000. This additional tiered system of reductions is expected to ease any undue burden on small entities. The rule also contains a provision for individual waiver of those fees to further protect any individuals or entities from economic hardship. The Commission could, of course, consider reducing the fees further, or even eliminating the fees, with respect to small businesses. However, in proposing the present fee schedule, the Commission is also attempting to satisfy the statutory directive of the IOAA to be "self-sustaining to the extent possible." The Commission believes the rule, as adopted, represents a fair balance which will satisfy the purposes of both the IOAA and the RFA.

Three commenters discuss the Initial Regulatory Flexibility Analysis. Two commenters argue that the Commission's analysis is inadequate, and that the Commission did not consider the possibility of not imposing fees. Another commenter complains that the effects on non-profit public interest organizations are not discussed.

The Commission believes it followed the requirements of the Regulatory Flexibility Act in its notice of proposed rulemaking and in this final rule. Further, while the Commission has operated for a long time without charging fees for these categories of services, its adoption of this fee schedule is authorized by statute.

VI. PAPERWORK REDUCTION ACT STATEMENT AND EFFECTIVE DATE

The information collection provisions of this rule have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520 (1982), and OMB's regulations, 5 C.F.R. Part 1320 (1984). OMB issued Control Number 19020132 for these sections. Interested persons can obtain information on the information collection provisions by contacting the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C., 20426 (Attention: Joseph Hartsoe, (202) 357-8033). This rule will become effective [*insert 30 days from date of publication in Federal Register*].

List of Subjects.

18 C.F.R. Part 3—Organization; Operation; Information and Requests.

18 C.F.R. Part 375—The Commission.

18 C.F.R. Part 381—General fees.

18 C.F.R. Part 385—Rules of Practice and Procedure.

18 C.F.R. Part 389—Paperwork Reduction Act, OMB Control Numbers.

In consideration of the foregoing, the Commission is amending Parts 3, 375, 381, 385, and 389 of Chapter I, Title 18, *Code of Federal Regulations,* as set forth below.

By the Commission.

(S E A L)

KENNETH F. PLUMB,
Secretary.

1. Part 3 is amended as follows:

(a) The authority citation for 18 C.F.R. Part 3 is amended to read as follows:

> Authority: Department of Energy Organization Act, 42 U.S.C. §§ 7101-7352 (1982); Executive Order 12,009, 3 C.F.R. 142 (1978); Administrative Procedure Act, 5 U.S.C. §§ 552 and 553 (1982), unless otherwise noted.

(b) in § 3.8(k)(2)(i), by removing the number "$5.75" and adding, in its place, the number "$5.60";

(c) in § 3.8(k)(2)(ii), by removing the number "$2.50" and adding, in its place, the number "$2.40"; and

(d) by adding a new sentence at the end of paragraph (h) and by adding a new paragraph (k)(7) to read as follows:

§ 3.8 **Public information and submittals.**

* * * * *

(h) * * * Each inquiry directed to the Chief Accountant that requires a written response must be accompanied by the fee prescribed by § 381.301 of this chapter.

* * * * *

(k) **Fees for Freedom of Information Act requests.**

* * * * *

(7) **Annual adjustment of fees.**

(i) **Update and publication.** The Commission, by its designee the Executive Director, will update the fees established in this section each fiscal year according to the formula in paragraph (iii) of this section. The Executive Director will publish the fees in the *Federal Register.*

(ii) **Payment of updated fees.** The fee applicable to a particular Freedom of Information Act request will be the fee in effect on the date that the request is received for purposes of section 388.107, 18 C.F.R. § 388.107 (FOIA timetables and procedures).

(iii) **Formula.** The fee for each quarter-hour of professional employee search time will be the approximate average hourly cost (including the cost of fringe benefits) to the Commission for professional employees (GS-10 or above) for the previous fiscal year. The fee for each quarter hour of clerical employee search time will be the approximate quarter-hour cost (including the cost of fringe benefits) for clerical employees (GS-9 or below) for the previous fiscal year. Duplication costs will be determined by estimating the cost to copy each type of agency record, and will be based on the cost of supplies used and the machines leased.

(iv) **Effective date of fee.** Any fee updated under this section is effective on the thirtieth day after publication in the *Federal Register,* unless otherwise specified in the *Federal Register* notice.

2. Part 375 is amended as follows:

(a) The authority citation for Part 375 continues to read as follows:

Authority: Department of Energy Organization Act, 42 U.S.C. §§ 7101-7352 (1982); Executive Order 12,009, 3 C.F.R. 142 (1978); Administrative Procedure Act, 5 U.S.C. § 553 (1982).

(b) in § 375.303, by adding a new paragraph (g) to read as follows:

§ 375.303 **Delegations to the Chief Accountant.**

* * * * *

(g) Deny or grant, in whole or in part, petitions for waivers of fees prescribed in § 381.301 of this chapter in accordance with § 381.106(b) of this chapter.

(c) in § 375.310, by adding a new paragraph (b) to read as follows:

§ 375.310 **Delegations to the Director of the Office of Opinions and Review.**

* * * * *

(b) Deny or grant, in whole or in part, petitions for waivers of fees prescribed in §§ 381.303 and 381.304 of this chapter in accordance with § 381.106(b) of this chapter.

(d) by revising § 375.313 to read as follows:

§ 375.313 **Delegations to the Executive Director.**

The Commission authorizes the Executive Director or the Executive Director's designee to:

(a) Prescribe the updated fees for Part 381 of this chapter in accordance with § 381.104 of this chapter.

(b) Prescribe the updated fees for Part 381 of this chapter in accordance with § 3.8(k)(7) of this chapter.

(c) Deny or grant, in whole or in part, petitions for waiver of fees prescribed in § 381.302 of this chapter in accordance with § 381.106(b) of this chapter.

(d) Deny or grant, in whole or in part, petitions for exemption from fees prescribed in Part 381 of this chapter in accordance with § 381.108 of this chapter.

(e) in § 375.314, by adding a new paragraph (gg) to read as follows:

§ 375.314 **Delegations to the Director of the Office of Hydropower Licensing.**

* * * * *

(gg) Deny or grant, in whole or in part, petitions for exemption from the fee for declaratory order petitions prescribed in § 381.302(a) of this chapter in accordance with § 381.302(c) of this chapter.

3. Part 381 is amended as follows:

(a) by amending the table of contents of Part 381 to include references to new § 381.108, Subpart C, and §§ 381.301 through 381.304 to read as follows:

PART 381—FEES

Subpart A—General Provisions

* * * * *

381.108 Exemptions.

* * * * *

Subpart C—Fees Applicable to General Activities

Sec.

381.301 **Requests for interpretations by the Office of Chief Accountant**

381.302 **Petitions for issuance of declaratory orders (except under part I of Federal Power Act)**

381.303 **Review of Department of Energy remedial order**

381.304 **Review of Department of Energy denial of adjustment**

(b) The authority citation for Part 381 reads as follows:

Authority: Department of Energy Organization Act, 42 U.S.C. §§ 7102-7352 (1982); Executive Order 12,009, 3 C.F.R. 142 (1978); Independent Offices Appropriation Act, 31 U.S.C. § 9701 (1982); Natural Gas Act, 15 U.S.C. §§ 717-717w (1982); Federal Power Act, 16 U.S.C. § 791a-828c (1982); Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 (1982); Public Utility Regulatory Policies Act, 16 U.S.C. §§ 2601-2645 (1982), Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1976), unless otherwise noted.

(c) in § 381.106(a), by removing the words "submit a" in the first sentence and adding, in their place, the words "submit an original and two copies of a";

(d) by adding a new § 381.108 to read as follows:

Subpart A—General Provisions

* * * * *

§ 381.108 **Exemptions.**

(a) **Filing of Petition.**

States, municipalities and anyone who is engaged in the official business of the Federal Government are exempt from

the fees required by this part and may file a petition for exemption in lieu of the applicable fee.

(b) **Decision on petition.**

A petitioner may claim this exemption by filing an original and two copies of a petition for exemption that includes evidence that the petitioner is a State or municipality, or is engaged in the official business of the Federal government. The Commission or its designee will analyze each petition to determine whether the petition has met the standards for exemption and will notify the petitioner whether it is granted or denied. If the petition is denied, the person will have thirty days from the date of notification of the denial to submit the appropriate fee to the Commission.

(e) by adding a new Subpart C to read as follows:

Subpart C—Fees Applicable to General Activities

§ 381.301 **Request for interpretation by the Office of Chief Accountant.**

The fee established for a request for an interpretation by the Chief Accountant under § 3.8 of the Commission Rules of Practice and Procedure, 18 C.F.R. § 3.8 (1983), that requires a written response is $100. The fee must be submitted in accordance with Subpart A of this Part.

§ 381.302 **Petition for issuance of a declaratory order (except under part I of the Federal Power Act)**

(a) Except as provided in § 381.302(b), the fee established for filing a petition for issuance of a declaratory order under § 385.207 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.207 (1983), is $4,900. The fee must be submitted in accordance with Subpart A of this Part.

(b) No fee is necessary to file a petition for issuance of a declaratory order that solely concerns the investigation, issuance, transfer, renewal, revocation, and enforcement of licenses and permits for the construction, operations, and maintenance of dams, water conduits, reservoirs, powerhouses, transmission lines, or other works for the development and

improvement of navigation and for the development and utilization of power across, along, from, or in navigable waters under Part I of the Federal Power Act.

(c) A person claiming the exemption provided in paragraph (b) of this section must file an original and two copies of a petition for exemption in lieu of a fee along with its petition for issuance of a declaratory order. The petition for exemption should summarize the issues raised in the petition for issuance of a declaratory order and explain why the exemption is applicable. The Commission or its designee will analyze each petition to determine whether the petition has met the standards for exemption and will notify the applicant whether it is granted or denied. If the petition is denied, the petitioner will have thirty days from the date of notification of the denial to submit the appropriate fee to the Commission.

§ 381.303 Review of a Department of Energy remedial order.

(a) **Except as provided § 381.303(b),** the fee established for filing a petition for review of a Department of Energy remedial order under Subpart I of the Commission's Rules of Practice and Procedure, 18 C.F.R. Subpart I (1983), is $2,900. The fee must be submitted in accordance with Subpart A of this Part.

(b) If the amount in controversy is below $30,000, then the fee to file a petition for review of a DOE remedial order is reduced as follows:

Amount in controversy:	Fee
$0-$9,999	$100
$10,000-$29,999	$600

(c) In order to qualify for the fees in paragraph (b) of this section, the check must be accompanied by an affidavit by the petitioner that states the amount in controversy.

§ 381.304 **Review of a Department of Energy denial of adjustment**

(a) **Except as provided in § 381.304(b),** the fee established for review of a Department of Energy denial of an adjustment request under Subpart J of the Commission's Rules of Practice and Procedure, 18 C.F.R. Subpart J (1983), is $3,700. The fee must be submitted in accordance with Subpart A of this Part.

(b) If the amount in controversy is below $30,000, then the fee to file a petition for review of a DOE denial of an adjustment is reduced as follows:

Amount in controversy:	Fee
$0-$9,999	$100
$10,000-$29,999	$600

(c) In order to qualify for the fees in paragraph (b) of this section, the check must be accompanied by an affidavit by the petitioner that states the amount in controversy.

4. Part 385 is amended as follows:

(a) The authority citation for Part 385 reads as follows:

Authority: Department of Energy Organization Act, 42 U.S.C. §§ 7101-7352 (1982); Executive Order 12,009, 3 C.F.R. 142 (178); Administrative Procedure Act, 5 U.S.C., §§ 551-557 (1982); Independent Offices Appropriation Act, 31 U.S.C. § 9701 (1982); Natural Gas Act, 15 U.S.C. §§ 717-717w (1982); Federal Power Act, 16 U.S.C. §§ 791a-828c (1982); Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 (1982); Public Utility Regulatory Policies Act, 16 U.S.C. §§ 2601-2645 (1982); Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1976), unless otherwise noted.

(b) In § 385.207, by adding a new paragraph (c) to read as follows:

§ 385.207 **Petitions (Rule 207)**

* * * * *

(c) Except as provided in 381.302(b), each petition for issuance of a declaratory order must be accompanied by the fee prescribed in § 381.302(a).

(c) in § 385.906, by adding a new sentence at the end of paragraph (b)(1) to read as follows:

§ 385.906 **Pleadings (Rule 906)**

* * * * *

(b) **By the petitioner.** (1) * * * Each answer filed with the Secretary of the Commission by the petitioner, in accordance with this paragraph, must be accompanied by the fee prescribed by § 381.303 of this chapter.

* * * * *

(d) by amending § 385.1004 as follows:

(a) in paragraph (c), by adding the words "and the fee required by paragraph (c) of this section" following the words "petition for review", and then redesignating paragraph (c) as paragraph (d).

(b) by adding a new paragraph (c) to read as follows:

§ 385.1004 **Commencement of proceedings (Rule 1004).**

* * * * *

(c) Each petition for review filed with the Secretary of the Commission must be accompanied by the fee prescribed by § 381.304 of this chapter.

* * * * *

5. Part 389 is amended as follows:

(a) The authority citation for Part 389 continues to read as follows:

Authority: Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520 (1982).

(b) The Table of OMB Control Numbers in § 389.101(b) is amended by adding "381.108" in the numerical order in the

Section column, and "0132" in the corresponding position in the OMB Control Number Column.

(c) The Table of OMB Control Numbers in § 389.101(b) is further amended by adding "381.302" in the numerical order in the Section column, and "0132" in the corresponding position in the OMB Control Number Column.

(d) The Table of OMB Control Numbers in § 389.101(b) is amended by adding "381.303" in the numerical order in the Section column, and "0132" in the corresponding position in the OMB Control Number Column.

(e) The Table of OMB Control Numbers is § 389.101(b) is further amended by adding "381.304" in the numerical order in the Section column, and "0132" in the corresponding position in the OMB Control Number Column.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:

Raymond J. O'Connor, Chairman;
A. G. Sousa, Oliver G. Richard III
and Charles G. Stalon,

FEES APPLICABLE TO GENERAL ACTIVITIES

Docket Nos. RM82-35-001, RM82-35-002 and RM82-35-003

ORDER DENYING REHEARING AND MAKING TECHNICAL CORRECTIONS

(Issued October 31, 1984)

I. INTRODUCTION

On August 31, 1984, the Federal Energy Regulatory Commission (Commission) issued a final rule establishing fees for general activities.[1] The Commission received petitions for rehearing of the final rule from Interstate Natural Gas Association of America (INGAA), Phillips Petroleum Company and Phillips Oil Company jointly (Phillips) and Transcontinental Gas Pipe Line Corporation (Transco). For the reasons stated below and those set forth in the final rule, this order denies these petitions.

INGAA and Transco request rehearing on three issues: (1) whether the Commission has demonstrated the relationship between the particular costs for which the Commission seeks reimbursement and the conferring of any special benefit conferred on the regulated company; (2) whether the Commission's reservation of the "direct billing" option is subjective, vague, arbitrary and capricious; and (3) whether the Commission has provided sufficient data to support the costs to be

[1] 49 Fed. Reg. 35,348 (September 7, 1984).

recovered through fees and thereby permitted the public a meaningful opportunity to comment on this rulemaking. INGAA contends as part of its first argument that the final rule failed to explain how it determined the fee scales for the remedial order appeals, how and when all fee reductions would take place, and why states and municipalities were exempted from all fees. INGAA also contends as part of its second argument that the fee rulemaking set forth no meaningful standards for allocating portions of direct billing to intervenors.

Phillips raises issue (1) above, and also contends that (1) the rulemaking should have provided that producers and resellers may recover the fee expenses as an adjustment to natural gas sales prices, the absence of such recovery constituting an unlawful reduction of the maximum lawful Natural Gas Policy Act (NGPA) prices and unlawful discrimination in favor of pipelines (who can include their Commission fees in their resale rates); and (2) the Commission should waive fees not only when a company is in dire financial straits but where the amount of the fee is so significant that it chills the filing or prosecution of the application or the effectuation of the contemplated transaction.

II. DISPOSITION OF PETITIONS FOR REHEARING

A. Benefits

In the final rule in this docket, the Commission established fees for the services and benefits it provides under the Natural Gas Policy Act. The fees were promulgated under the authority of the Independent Offices Appropriation Act (IOAA).[2] The IOAA states, in pertinent part, that:

> It is the sense of Congress that each service or thing of value provided by an agency . . . to a person . . . is to be self-sustaining to the extent possible.

INGAA, Transco and Phillips all argue that the Commission has failed to show that the fees set forth in this rulemaking are commensurate with the benefits received by the affected companies. This argument is virtually identical both to the

[2] 31 U.S.C. § 9701 (1982).

issue raised by INGAA and Transco in their requests for hearing of the Commission's rulemaking on fees applicable to natural gas pipeline matters,[3] and to the issue raised by Phillips (and also Pennzoil Co.) in its request for rehearing of the Commission's rulemaking on fees applicable to producer matters under the Natural Gas Act.[4] In those two rehearings, the Commission thoroughly examined the "special benefits" issue and affirmed the correctness of the initial conclusion in the two rulemakings that the Commission did provide such benefits to the companies to whom the fees are charged. We consider the reasoning and conclusions of those orders denying rehearing applicable to the arguments raised in this docket and therefore again reject petitioners' general argument.

We also find no merit regarding INGAA's three specific contentions. The method of determining the fee schedule for remedial order appeals was fully set forth in Section III-E of the final rule. The reduced fees for all services covered in the final rule are implemented simply by sustituting them for the full fees set forth earlier in the rulemaking.[5] The reduced fees went into effect on October 9, 1984, as explained in Section VI of the rule. Finally, states and municipalities have been exempted from fees for the reasons spelled out in Section III-F-3 of the final rule, *i.e.*, that such entities' involvement in Commission proceedings generally serves the public interest, and that separation of such "public interest" cases from proceedings in which these governmental entities could be subject to fees would impose an undue administrative burden on the Commission.

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[3] 49 Fed. Reg. 17,437 (April 24, 1984), *appeals docketed sub nom.* Transcontinental Gas Pipe Line Corp., et al. v. FERC, Nos. 84-2267, *et al.* (10th Cir. June 19, 1984). *See also* Order Denying Rehearing in Docket Nos. RM82-30-001 through -003, issued today.

[4] 49 Fed. Reg. 17,435 (April 24, 1984), *appeal docketed sub nom.* Phillips Petroleum Co. v. FERC, No. 84-1846 (10th Cir. June 18, 1984). *See also* Order Denying Rehearing in Docket Nos. RM82-30-001 through -003, issued today.

[5] The reduced fees must accompany the petition for review in an adjustment denial appeal and the answer in a remedial order appeal. Sections 381.303(a) and 381.304(a) are amended to clarify this point.

B. Direct Billing

In the final rule in this docket, the Commission recognized that a few proceedings may be so extensive in scope and present such complex issues as to require an extraordinary amount of time and effort. In such cases, the fees established in the final rule would bear no reasonable relationship to the Commission's actual cost of the proceeding. The rule therefore reserved the option of "ordering a direct billing when the processing of the filing begins, or any time up to one year after receiving a complete filing."[6] INGAA and Transco challenge this option as vague, subjective, arbitrary and capricious, and INGAA also criticizes the rule for failing to set forth meaingful standards for allocating portions of the direct billing to intervenors. The Commission has decided that it is better to implement the direct billing procedure on a case-by-case basis initially rather than attempt to develop detailed generic standards without practical experience. Once we gain practical experience, we will be in a much better position to develop sound and workable generic standards. In the meantime, petitioners will have every opportunity to question or challenge any Commission direct billing whenever the issue arises.[7] We therefore reject petitioners' argument concerning direct billing.

C. Sufficiency of Data

INGAA and Transco claim that the data placed in the Commission's public files is insufficient to verify the cost basis for each fee set forth in the final rule. We disagree. The rule itself described in considerable detail the cost basis of these fees, and additional data was placed in the public file for this docket.[8] The Commission has thereby fulfilled its public disclosure obligations under the law.[9]

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[6] 49 Fed. Reg. at 35,353-35,354.

[7] 49 Fed. Reg. 35,357 at 35,362-35,363.

[8] 49 Fed. Reg. 35,357 at 35,359-35,361.

[9] We note that a similar claim by INGAA and Transco was rejected in the order denying rehearing of the rulemaking concerning fees applicable to natural gas pipeline matters. 49 Fed. Reg. 17,437 at 17,438. *See also* Order Denying Rehearing in Docket Nos. RM82-30-001 through -003, issued today.

D. Passthrough

Phillips asks the Commission to permit producers and resellers to pass through to their customers the cost of the fees, as the pipelines are allowed to do.[10] The NGPA does not generally authorize the Commission to increase prices above the levels set forth in the Act. The Commission can increase rates under sections 104, 106, and 109, but only if such increase is just and reasonable under the Natural Gas Act. Phillips does not claim that such increased rates would be just and reasonable, nor has it alleged that confiscation would occur without the recoupment of fees paid (*FERC v. Pennzoil Producing Co.*, 439 U.S. 508 (1979)). Certainly, even if the Commission were to allow passthrough under these sections, it would still not address the problem for natural gas priced under the other NGPA sections.

With respect to the discrimination claim by Phillips, neither the NGPA, as noted, nor the Natural Gas Act prohibits the passthrough of fees paid by producers, resellers and pipelines. But it is within the Commission's discretion to treat first sellers and pipelines differently because of the fundamental differences in these laws as they apply to these two regulated entities; first sellers are subject to fixed ceiling prices under the NGPA while pipelines are not.

We also reject Phillips' argument that section 110 could be used to allow producers to pass through the fees. Such fees do not fall within the types of production-related costs contemplated by NGPA section 110 (see section 110(a)(2)). Moreover, if the producers and resellers qualify for a waiver of, or an NGPA section 502(c) adjustment from, the fees, then they can achieve through those means the same result as Phillips now seeks. Finally, we note that the IOAA provides that the recipient of a benefit—not its customers—may be charged for the agency's costs in providing that benefit.

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[10] This argument was also rejected in the Order Denying Rehearing in Docket Nos. RM82-30-001 through -003, issued today.

E. Waiver

Finally, Phillips argues that the Commission should waive fees in any case where the amount of the fee is significant enough to chill the company's action which would trigger the fee. This contention, previously raised by Phillips in a request for rehearing in a rulemaking concerning fees applicable to producer matters under the Natural Gas Act, was fully considered and rejected in that proceeding.[11] Phillips has raised no new arguments which persuade us to abandon the conclusion reached in that rulemaking.

The Commission Orders:

In consideration of the foregoing, the Commission denies rehearing of the final rule in this docket; and amends Part 381 of Chapter I, Title 18, *Code of Federal Regulations,* as set forth below.

By the Commission.

(S E A L)

KENNETH F. PLUMB,
Secretary.

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[11] 49 Fed. Reg. 17,435 at 17,437. *See also* Order Denying Rehearing in Docket Nos. RM82-30-001 through -003, issued today.

1. The authority citation for Part 381 continues to read as follows:

> Authority: Department of Energy Organization Act, 42 U.S.C. 7101-7352 (1982); Executive Order 12009, 3 C.F.R. 142 (1978); Independent Offices Appropriations Act, 31 U.S.C. 9701 (1982); Natural Gas Act, 15 U.S.C. 717-717w (1982); Federal Power Act, 16 U.S.C. 791a-828c (1982); Natural Gas Policy Act, 15 U.S.C. 3301-3432 (1982); Public Utility Regulatory Policies Act, 16 U.S.C. 2601-2645 (1982); Interstate Commerce Act, 49 U.S.C. 1-27 (1976), unless otherwise noted.

2. Section 381.303(a) is revised to read as follows:

§ 381.303 **Review of a Department of Energy remedial order.**

(a) Except as provided in § 381.303(b), the fee established for an answer to a Department of Energy remedial order under Subpart I of the Commission's Rules of Practice and Procedure, 18 C.F.R. Part 385, Subpart I (1983), is $2,900. The fee must be submitted in accordance with Subpart A of this part.

* * * * *

3. Section 381.304(a) is revised to read as follows:

§ 381.304 **Review of Department Energy denial of adjustment.**

(a) Except as provided in § 381.304(b), the fee established for filing a petition for review of a Department of Energy denial of an adjustment request under Subpart J of the Commission's Rules of Practice and Procedure, 18 C.F.R. Part 385, Subpart J (1983), is $3,700. The fee must be submitted in accordance with Subpart A of this part.

* * * * *

SECTION E

IOAA, 31 U.S.C. § 9701 (1982), provides as follows:

§ 9701. Fees and charges for Government services and things of value

(a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.

(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be—

(1) fair; and

(2) based on—

(A) the costs to the Government;

(B) the value of the service or thing to the recipient;

(C) public policy or interest served; and

(D) other relevant facts.

(c) This section does not affect a law of the United States—

(1) prohibiting the determination and collection of charges and the disposition of those charges; and

(2) prescribing bases for determining charges, but a charge may be redetermined under this section consistent with the prescribed bases.

IOAA (1952 version), 31 U.S.C. § 483a (1970), provides as follows:

§ 483a. Services as self-sustaining; uniformity; regulations; deposit in Treasury; effect on other laws.

It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of any existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price. (Aug. 31, 1951, ch. 376, title V. § 501. 65 Stat. 290.)

SECTION F

Extract from Budget Circular No. A-25, (1959) (issued by the Bureau of the Budget)

3. **General policy.** A reasonable charge, as described below, should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit.

a. Special Services

(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (*e.g.*, receiving a patent, crop insurance, or a license to carry on specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficiary (*e.g.*, certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (*e.g.*, receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

(2) No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (*e.g.*, licensing of new biological products).

Supreme Court, U.S.
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No. 85-2022

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
AND
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

Petitioners contend that the Federal Energy Regulatory Commission (Commission) violated the Independent Offices Appropriation Act (IOAA), 31 U.S.C. 9701, in establishing fees for approving rate changes proposed by natural gas pipelines.

1. The statutory background and relevant facts are set forth in the opinion of the court of appeals (Pet. App. 3a-6a, 8a-9a). The IOAA embodies "the sense of Congress" that the recipient of a "service or thing of value provided by an agency" should pay fees so that the provision of such services is "self-sustaining to the extent possible" (31 U.S.C. 9701(a); Pet. App. 1e). To that end, agencies are authorized to levy charges that are (31 U.S.C. 9701(b); Pet. App. 1e):

(1) fair; and
(2) based on—
  (A) the costs to the Government;
  (B) the value of the service or thing to the recipient;
  (C) public policy or interest served; and
  (D) other relevant facts.

Under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, when a pipeline makes a rate change in order "to recover [the pipeline's] costs and earn a fair rate of return on jurisdictional sales," it must submit the change to the Commission for review and approval (Pet. App. 6b (footnote omitted)). The Commission promulgated regulations setting a fee of $2,000 for processing a rate change (*id.* at 23b). It explained (*id.* at 16b-21b) that it reached this figure by first calculating its total employee costs (based on time records) of processing applications for rate changes; then adding a proportionate share of overhead and support services (specifically excluding activities, such as responding to public and governmental inquiries, for which the agency found little or no benefit to applicants); and then dividing the costs for all applications by the number of completed applications to determine a single fee for each application. The Commission justified the charge on the ground that a natural gas pipeline receives a specific benefit from the Commission's services in approving rate changes because rates "provide a means for the [pipeline] to obtain its revenues" (*id.* at 12b-14b & n.18).[1]

The Commission also provided (Pet. App. 26b-28b) a different fee procedure for complex rate change applications. For such applications, the agency bills the pipeline directly for the actual costs of processing its application. In that way the costs in extraordinary cases do not affect the fees charged in routine cases.

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[1] As this Court recognized in *FPC* v. *New England Power Co.*, 415 U.S. 345, 351 (1974), Bureau of the Budget Circular No. A-25 (Sept. 23, 1959) contains "the proper construction of the Act." That circular provides in relevant part (Pet. App. 9a, 1f) that "[w]here a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service."

2. The United States Court of Appeals for the Tenth Circuit upheld the Commission's fee regulations (Pet. App. 1a-18a). Although there was agreement that "the transfer of a 'special benefit' to an identifiable recipient is a prerequisite for establishing a lawful fee by an agency" (*id.* at 10a), petitioners argued that the Commission had not properly applied that governing principle here. Petitioners contended that benefits provided by the Commission "accrue to the general public [and] not to the regulated industries" and therefore the cost of granting services "cannot be assessed against and borne by petitioners" (*ibid.*). The court squarely rejected that claim, relying on the established principle that where "an agency performs a service from which a regulated entity derives a 'special benefit,' it may charge a fee, even though the public also benefits" (*id.* at 12a).

The court held (Pet. App. 14a) that the Commission "identifies the benefits which it believes are conferred upon the regulated entity applying for the Commission's services. It appears from the record before us that the Commission gave careful consideration to the requirements of the IOAA * * * [and] did not act arbitrarily or capriciously." The court further held that "the *full costs* of providing a service to regulated entities can be assessed regardless of the benefit flowing to the public" so long as there is a measurable benefit to the pipeline (*id.* at 15a (emphasis in original)). The court also rejected the contention that the "direct billing procedure" used in extraordinary cases is a "pretext for fees which the Commission 'arbitrarily' decided not to establish," holding that it is "reasonably related to administrative enforcement and does not contravene statutory provisions" (*id.* at 17a).

3. The decision below is correct and is consistent with the statute and with this Court's decisions in *National Cable Television Ass'n* v. *United States,* 415 U.S. 336 (1974); and *FPC* v. *New England Power Co.,* 415 U.S. 345

(1974). The decision does not conflict with any decision of any other court of appeals. Further review is therefore not warranted.

a. As the court of appeals held (Pet. App. 8a-10a), and petitioners concede (Pet. 7-8), the IOAA and this Court's decisions permit agencies to charge fees to "identifiable recipient[s]" (*New England Power,* 415 U.S. at 349-351) of "special benefits" (*National Cable,* 415 U.S. at 343). The Commission and the court of appeals concluded that because Section 4 of the Natural Gas Act, 15 U.S.C. 717c, prohibits pipelines from changing rates unless the Commission approves the new rate, agency processing of a rate change confers a special benefit on an identifiable recipient.

Petitioners claim, however (Pet. 10), that the IOAA "was not intended to cover the consumer protection function performed by the Commission in determining that pipeline rates are just and reasonable," and (*id.* at 11) that the IOAA does not include "authority to impose fees for the performance or regulatory functions of a nonlicensing character." These contentions are not supported by the statute and are inconsistent with controlling case law. The IOAA, both as initially enacted (31 U.S.C. (1970 ed.) 483a; Act of Aug. 31, 1951, ch. 376, § 501, 65 Stat. 290; Pet. App. 2e) and later recodified (31 U.S.C. 9701; Act of Sept. 13, 1982, Pub. L. No. 97-258, § 9701, 96 Stat. 1051; Pet. App. 1e), clearly authorized fees to be charged to the identifiable immediate beneficiaries of agency actions, even though the public benefits from the overall regulatory scheme. The original statute authorized fees for "any * * * thing of value" (Pet. App. 2e). The recodified version retains the phrase "thing of value" and in addition authorizes fees for any "service" an agency provides (Pet. App. 1e). For example, in *New England Power,* 415 U.S. at 351, this Court stated that a rule on accounting practices—a "regulatory function of nonlicensing character"—provided the basis for a fee if the industry derives a benefit.

In this case it is beyond dispute, and the Commission so found, that the individual pipelines benefit from the processing of their rate change applications. Finally, as the court of appeals recited, petitioners' argument has been rejected by the Fifth, Tenth and District of Columbia Circuits (Pet. App. 11a-12a (citing *Electronic Industries Ass'n* v. *FCC,* 554 F.2d 1109 (D.C. Cir. 1976)); *Mississippi Power & Light Co.* v. *NRC,* 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980); and *Nevada Power Co.* v. *Watt,* 711 F.2d 913 (10th Cir. 1983)).

b. Petitioners' reliance on this Court's decisions in *National Cable* and *New England Power* is misplaced. In both cases, the Court rejected annual fees, which it found to be in the nature of taxes, assessed generally against members of the regulated industry without regard to specific agency action benefiting particular entities. The Court did *not* hold that an agency may not charge fees for specific regulatory activities that benefit identifiable entities merely because the ultimate function of the regulation is consumer protection. As the court of appeals noted here, to hold that agencies may not charge fees for services which in any way benefit the public could constitute a judicial repeal of the IOAA, for " 'all public agencies are constituted in the public interest' " (Pet. App. 12a (quoting *Mississippi Power & Light Co.,* 601 F.2d at 229)).[2]

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[2] Petitioners mistakenly rely (Pet. 12-13) on a portion of the court of appeals decision in *New England Power Co.* v. *FPC,* 467 F.2d 425 (D.C. Cir. 1972), aff'd, 415 U.S. 345 (1974) in which the court stated that if the public benefits at all, the agency may not charge a fee. That language has no continuing force for two reasons. First, although the court of appeals so stated, this Court's decision in *New England Power* did not rely on that rationale. See 415 U.S. at 349. Second, the District of Columbia Circuit itself abandoned that analysis in *National Cable Television Ass'n* v. *FCC,* 554 F.2d 1094, 1101, 1102 (1976).

Nor is there any merit to petitioners' contention that in a prior rulemaking proceeding in 1965, the Commission took a different position on fees. An agency is not precluded from changing its mind

c. Nor is there substance to the claim (Pet. 8-10) that the Commission impermissibly designed its fee schedule to recover all its costs by assuming the existence of individual benefits when in fact the Commission rulings merely "shift onto regulated companies the cost of performing basic and inherently public benefit functions not covered by the IOAA" (*id.* at 10).

The court of appeals found (Pet. App. 14a-17a) that the Commission had satisfactorily explained how it arrived at the fee structure, specifically identifying which costs were included and which were excluded (see *id.* at 16b-19b, 11d-13d). The Commission calculated its employee costs and overhead, such as rent, utilities and printing, to determine the average monthly cost of processing an application, and multiplied the figure by the average number of months it took to review rate applications. The Commission next calculated support costs, such as budget and management, and apportioned them to the fees at issue according to the percentage of its total time the agency consumed in reviewing rate applications. Finally, the agency excluded certain activities, such as responding to public inquiries, litigation, enforcement and rulemaking from the fee structure.

Thus, contrary to the petitioners' assertion, the agency neither assumed that all of its activities provide a special benefit nor sought to recover all its operational costs. Rather, it focused on actual service to petitioners and amply explained the basis for its fees.

d. Finally, there is no merit to petitioners' challenge to the Commission's direct billing procedure applicable to extraordinary cases. Under that procedure (which the agency has never had occasion to apply), the Commission would

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(*NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 351 (1978); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)), especially where, as here, intervening court decisions have clarified the IOAA.

charge a company the actual cost of reviewing a filing, rather than the standard fee based on averages.[3] As the Commission explained, this procedure would be confined to the rare complex case in which the standard fee "bear[s] no reasonable relationship to the actual cost of processing" (Pet. App. 27b), and will be implemented on a case-by-case basis. In these circumstances, the court of appeals correctly found (*id.* at 17a) that the Commission had acted reasonably in providing for such unusual filings.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[3] Extraordinary cases are not included in the calculation of average costs (Pet. App. 27b).

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

In the Memorandum of the Federal Energy Regulatory Commission in Opposition to the Petition for a Writ of Certiorari, the Respondent Federal Energy Regulatory Commission ("Commission") asserts that "it is beyond dispute, and the Commission so found, that individual pipelines benefit from the processing of their rate change applications." Memorandum in Opposition at 5. The Commission's *ipse dixit*, however, is far from being beyond dispute and the Commission's mere "finding" that pipelines benefit from processing their rate changes does not make it so, but rather rests on a strange notion of what constitutes a benefit as well as a fallacious analysis of the Independent Offices Appropriation Act ("IOAA"), 31 U.S.C. § 9701.

Stripped of its veneer, the Commission's current determination that fees for rate case filings are permitted under the IOAA is tantamount to a claim that members of a regulated industry receive a "special benefit" whenever the regulated company is required to take an action to comply with the law and the agency monitors compliance therewith. The "special benefit" standard thus effectuated is essentially limitless; moreover, it is divorced utterly from the public interest considerations that motivated passage of the Natural Gas Act ("NGA"), the Act from which the Commission derives authority to regulate the rates of interstate natural gas pipeline companies.

The Commission and the court below failed to come to grips with the fact that rate regulation under the NGA was instituted solely to protect the public (*see* Section 1 of the NGA, 15 U.S.C. § 717(a)) and this public benefit feature of the Act may not be read out of the statute to serve some other perceived expedient. The legislative history of the NGA is replete with examples of the behavior the NGA was intended to control. Against this unequivocal legislative history and when the purpose of the Act is declared to be the protection of the consuming public, it is nonsensical to suggest that this interest is merely incidental and that, consequently, it may be disregarded in order to impose on pipelines the entire cost of regulation.

The Commission contends (Commission Memorandum in Opposition at 5, n.2) that it is entitled to change its mind from its determination in 1965 that it had no authority to impose fees for rate change filings "especially where, as here, intervening court decisions have clarified the IOAA." While we agree that this Commission and other similar regulatory bodies may and occasionally do change their minds on policy matters, the Commission may not change its mind on matters of law absent a change in the law or court interpretations of the law. Since 1965, the only cases decided by *this* Court interpret-

ing the IOAA are *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) and *FPC v. New England Power Co.*, 415 U.S. 345 (1974) and these cases are in direct conflict with the Commission's current determination, as affirmed by the court below. Further, none of the subsequent court of appeals decisions cited by the Commission in its memorandum in opposition purports to disagree with or distinguish *National Cable* and *New England Power* and none purport to condone fees for rate changes for regulated pipelines or electric utilities.[1]

The Commission contends (Memorandum in Opposition at 4) that its view of the IOAA finds support in the language of the IOAA itself. The present statutory language, however, is a recodification, not an amendment, of 31 U.S.C. § 483(a), the 1951 version of the statute. Section 483(a) listed specific things of value for which fees could be charged and specified in a catchall provision that fees could be charged for other *similar* things of value. The statute does not say, nor does it even begin to suggest, that imposing restrictions on a pipeline's ability to increase its revenues and earnings constitutes a "thing of value" to the regulated pipeline. It defies the plain and ordinary meaning of the statutory language as well as commonsense to impose on the statute the construction that the Commission has advanced in the Orders at issue here.

Finally, it is ironic that the Commission chooses the current economic climate to claim that restraints upon

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[1] The Commission's reference to this Court's observation in *New England Power* that a rule on accounting practices would provide the basis for imposing a fee "if the industry derives a benefit" (Memorandum in Opposition, p. 4) is a red herring. We are not here contesting a fee for reports on accounting practices and the Commission does not impose such a fee. Even so, the Court only held that there must be a demonstration of a benefit to the industry and the Commission has not made that showing, either with rate regulation or, if they chose to impose fees upon them, accounting reports.

the ability of pipelines to increase prices constitute a benefit to the pipelines. Virtually all other industries, including natural gas producers, have been freed of federal regulation and only the marketplace governs the prices which the individual members of those deregulated industries may charge. Yet, natural gas pipelines remain restrained by regulation to the "lowest reasonable rates" permitted by the Federal Energy Regulatory Commission and the Commission claims that these restraints benefit the industry. To the contrary, Congress placed limits on the type of activities for which fees could be charged. It did not intend, and the language of the IOAA does not now permit, an agency to bootstrap its authority to regulate an industry into authority to impose fees for any activity which the agency undertakes.

Respectfully submitted,

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